

Linda J. Robbins, CSR, RDR, CRR

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

POSITIVE SOFTWARE SOLUTIONS,)
INC.,)
Plaintiff,)

VS.) CIVIL ACTION NO.
3:03-CV-0257-N

NEW CENTURY MORTGAGE CORP.,)
et al.,)
Defendants.)

IN RE: BARRY C. BARNETT) MISC. ACTION NO.
and OPHELIA F. CAMINA,) 3:07-MC-93-N
Respondents.)

APRIL 19, 2008

TRANSCRIPT OF MOTIONS FOR SANCTIONS HEARING
BEFORE THE HONORABLE DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

DECEMBER 19, 2008

THE COURT: Be seated. Good morning.

MR. SHORE: Good morning, Judge.

MR. BECK: Morning, Your Honor.

THE COURT: I've given you-all two hours per side, but you don't have to use it all. I think we'll take about a ten-minute break at the close of plaintiff's opening and then a short break after -- or movant's opening, a short break after the response.

So movant may proceed.

MR. SHORE: May it please the Court, Judge Godbey, we're here on a long -- a much anticipated and long awaited hearing on the motion for sanctions. And what we would like to do here today is give you a summary -- and there is a notebook in front of you that I will be following pretty judiciously. And I've also provided a copy for your clerk and the court reporter.

Opposing counsel also will have a copy that they can follow along with. However, obviously if at any time you want to interrupt and ask any question or divert me, I'll be happy to do so and then struggle mightily to recover back to my presentation.

We're going to begin, and it's -- it's sort of an outline summary as we're going to begin talking about the

1 2000 version of LoanForce. And as an overview, it's our
2 contention that the respondent suppressed the 11/9/2000
3 version of LoanForce in order to win the arbitration.

4 We now know that there are actually two versions of the
5 11/9/2000 version of LoanForce basically from their filings
6 earlier this week. One is the Norment version which was
7 suppressed and remains suppressed. And another is a -- is
8 a version that I believe was blankly inadvertently produced
9 and its production was clouded, hidden, and misrepresented
10 in writing to us and to the arbitrator so that it would not
11 be discovered or perhaps it was inadvertently produced like
12 the Norment analysis. But we'll get into that in a minute.

13 Respondents also suppressed what is known as a VSS
14 database and versions of LoanTrack, LoanTrack-2, and MLAS
15 in an effort to conceal infringement.

16 The also suppressed numerous documents indicating Udo
17 Pooch's written opinions that were inconsistent with his
18 opinions at trial and also would have revealed his bias
19 and lack of credibility.

20 They also misrepresented the role of LoanForce in
21 the development of mLAS. They repeatedly told this Court
22 that mLAS was developed in a clean room environment by
23 programmers who had absolutely no access to LoanForce.
24 They knew that was not true, their clients knew it was not
25 true, and the documents discovered since the -- the case

1 clearly indicate that was not true.

2 That was done to avoid a broad preliminary injunction
3 which the documents from their client now demonstrate they
4 expected to be issued and were taking all measures necessary
5 to keep it from being broad enough to actually harm their
6 business.

7 They also misrepresented to the Court repeatedly that
8 New Century had been purged of LoanForce. This was also
9 part of the efforts to limit the preliminary injunction.
10 And later, when they learned, even assuming that they
11 believed for a moment that the purge actually took place,
12 they knew it didn't take place as they represented. And
13 when they realized that it had not taken place at all, they
14 made no effort to inform the Court or Positive Software.

15 They also suppressed evidence inconsistent with New
16 Century's fraud claim, evidence that actually completely
17 disproves the fraud claim. And that will be the last part
18 of the presentation today.

19 So the first thing we're going to talk about is the
20 order or the duty to produce LoanForce in each and every
21 single version, including the version that John Norment
22 discovered on the Nitrogen server. Their duty to produce
23 it comes from an order on a Motion to Compel Responses to
24 Request for Production. And this is the request: New
25 Century is requested to produce all documents that are

1 relevant or refer to the programs.

2 The programs are listed as LoanForce, and not only
3 were they supposed to -- all versions, but they were also
4 requested to include any databases or database storage
5 schema modeling. So if they had any database of programs
6 and versions of programs, they were specifically requested
7 to produce that. They did not produce it.

8 Now, in the response, the original response to this
9 request for each and every version of LoanForce, including --
10 and the other programs, including databases that would
11 contain the programs or databases used to create the
12 programs, New Century agreed that it would produce
13 responsive information regarding LoanForce, LoanTrack,
14 LoanTrack-2, et cetera, including mLAS.

15 So not only was there an order from the arbitrator
16 compelling the production of this material, from the very
17 beginning they had agreed in writing to produce it.

18 The next slide is actually the order. And Mr. Shurn
19 generally issued 30-, 40-page orders, but -- and this is in
20 your notebook, but the 16 items or the 16 programs at issue,
21 any objections regarding them are overruled--this is any
22 of their objections to discovery--LoanForce, LoanTrack,
23 LoanTrack-2, and mLAS.

24 So not only did they agree to produce every single
25 version of those programs and any databases that were used

1 to create them and contain them, they were ordered to do so
2 by the arbitrator.

3 Shortly after that order, I believe the day after
4 that order, Ms. Camina wrote a letter to the arbitrator
5 and says, to the extent they exist and have not previously
6 been produced, they would agree other versions of source
7 code for the 16 programs.

8 That's an agreement in writing, recognizing the duty
9 and obligation to produce each and every single version of
10 LoanForce, LoanTrack, mLAS, LoanTrack-2, as well as the
11 databases that they are stored in and used to create them.

12 She also in the same letter, "After the telephonic
13 hearing, I contacted Ralph Canada, counsel for Positive,
14 regarding production of other versions of source code for
15 the 16 items." And she states, "New Century does not
16 maintain versions of the items."

17 So what she was telling Mr. Canada on the 13th of
18 November and the arbitrator on the 13th of November was
19 that no other versions of the programs existed that had
20 not already been produced on November 13th.

21 That representation never changed. From that day
22 until the end of the arbitration, that representation
23 that no other versions existed never changed.

24 Now, in response, Mr. Canada wrote back to the
25 arbitrator, "Accordingly, Positive respectfully requests

1 that all documents that the NC Parties were ordered to
2 produce, including the source code for current and former
3 versions ... be produced no later than November 21 ... one
4 week from today." And request -- and -- and "... Your Honor
5 made it clear that the source code that the NC parties were
6 to produce included the LoanForce database sql statements."

7 So, again, the arbitrator had ordered this be produced
8 on November 21st, Ms. Camina says nothing exists, there
9 are no older versions of LoanForce beyond what already
10 exists, and Mr. Canada responded reiterating, we still
11 expect everything that you have to be produced.

12 Now, again, in response to Canada's letter, Ophelia
13 Camina brings the arbitrator, the category involves other
14 versions of source code for the 16 items. "As explained
15 in my letter of November 13, no other versions exist."

16 So, again, another representation which we know is not
17 true because they had a VSS database that contained every
18 version of LoanTrack, LoanTrack-2, mLAS, every single
19 version--and we'll see that later--and it was not produced.
20 We also know that the Norment version, the Norment version
21 of LoanForce discovered on the Nitrogen server was not
22 produced.

23 And I think the next step in this progression is to
24 talk about what happened on November 21st.

25 Now respondents contend in a brief recently filed

1 with the Court that New Century produced a full, hard copy
2 printout of the November 9 script to Positive on November 21,
3 2003, and they gave these Bates range numbers (indicating).
4 And supposedly they found it for the first time after this
5 weekend.

6 Well, Your Honor, I have here -- first of all, I want
7 to offer into evidence Exhibit 1 in response to this, and
8 Exhibit 1 is New Century's certificate of compliance with
9 their discovery obligations. And we'll get to that.

10 Exhibit 2, 3, and 4 is the code that they produced on --
11 on disk. And I think what you'll find if you get a chance
12 to peruse what they produced on disk, disk 1 or Exhibit 2
13 and Exhibit 3 contain no SQL code at all. Exhibit 4
14 contains 35 SQL fields all from a version of mLAS and a
15 version of the RSDB database. There is no LoanForce code
16 on any of the disks.

17 We had an agreement with New Century that code would be
18 produced in the form in which it's found which is machine
19 readable or -- or form that's on disk so that it could be
20 searched.

21 I cannot tell you exactly what happened on November
22 22nd when we got this other than the fact that our general
23 practice was to search the disk for things like sql or
24 LoanForce, and if it wasn't there, in this case it wasn't
25 there, that would have probably been the end of the -- of

1 the work.

2 And the reason why it was the end of the work is at
3 the time they produced these materials, they made a
4 representation to us that what they were producing was
5 the software as they were currently using it. And they
6 made that representation again in Exhibit 1.

7 Let's go to the next slide.

8 So here we have Ms. Camina's cover letter for
9 November 21st, 2003. It says, Also find enclosed herein
10 find documents and CDs Bates numbered, and here's the Bates
11 ranges that include the Bates range of the code that they
12 put in the brief to the Court.

13 Now, again, here are the documents that were produced
14 on the 21st (indicating). There's no index to the
15 documents. There's no list of contents. There is simply
16 a giant pile of disorganized documents.

17 And I have gone in and I have put a yellow sheet at
18 the beginning and end of the Bates range numbers that they
19 reference in the brief. And they are here for the Court to
20 see or I'll mark them for an exhibit if the Court wants them
21 marked. But there is no cover sheet; there is no file name.
22 Suddenly in the middle of these documents, a bunch of SQL
23 tables start up.

24 Go ahead.

25 So there is no corresponding computer file in any of

1 the accompanying CDs; the code is not titled or identified
2 as Full LoanForce Database Script.sql; there's no indica-
3 tion of file size or file type, SQL or otherwise; and the
4 11/21/2003 production obviously included hundreds of pages
5 of other SQL code that has nothing to do with LoanForce.

6 Now, what did they tell us -- now, what did they tell
7 us later about what they had produced? Now, Barry Barnett
8 filed with the arbitrator a description of what was produced
9 on November 21st. And this -- this is consistent with what
10 they told us they were producing. They had already told us
11 there are no versions of the programs older than what we've
12 already given you.

13 So on November 21st, signed by Barry Barnett, "New
14 Century produced the versions of the programs as New Century
15 was currently using them," and he gives the documents' Bates
16 range right here (indicating).

17 Within this Bates range of the versions of programs as
18 New Century is currently using them is the original version
19 of LoanForce or a version of LoanForce that dates back in
20 some parts to November 9th, 2000, a version of LoanForce
21 that had been enjoined, that they weren't supposed to be
22 using, that they weren't even supposed to have access to,
23 and Barry Barnett is telling us that that code, that enjoined
24 code that they were supposed to have no access to is the
25 version of the programs as New Century was currently using

1 them on November 21st, 2003.

2 So when they told us what they were producing was the
3 current version of the codes as they were using them, which
4 is what they told us at the time and what Barry Barnett
5 reiterated in January to the arbitrator, somehow we were
6 supposed to think they're still looking LoanForce so we need
7 to look through the paper -- it's not on the disk, but we
8 need to look through all this paper and see if maybe they're
9 still using LoanForce in violation of the Preliminary
10 Injunction because the only thing they told us they
11 produced was what they were currently using.

12 Now, if Barry Barnett was telling the truth when he
13 made this representation to the arbitrator, he is admitting
14 to contempt of the Preliminary Injunction. He is admitting
15 to contempt of the Protective Order. He is admitting that
16 they were continuing to use LoanForce on November 21, 2003
17 in violation of this Court's orders. He certainly was
18 saying consistently with what he told us they were producing
19 on November 21st.

20 Next slide.

21 Where did the LoanForce SQL code printout delivered on
22 11/21/2003 come from? We don't know. Was it what they were
23 actually using? Was it still on a software development
24 server somewhere? Where did they get it?

25 If Barnett was telling the truth that what they

1 produced, the code they produced on November 21st was what
2 they were currently using, how was it currently being used?
3 In any event, it is clearly contempt.

4 Now, let's take a look then on the 21st at an e-mail
5 exchange between Ms. Camina and Mr. Chan. Again, "New
6 Century has determined that it is impossible to provide
7 copies of the programs as they existed of October 31, 2001."
8 So, again, they're saying they can't get anything earlier,
9 they cannot produce any version earlier of any program,
10 including LoanForce, earlier than October 31st, 2001.

11 The next.

12 In response, Mr. Chan writes to Camina, we still want
13 you to inform us about where the earliest available date
14 for copies of the programs are.

15 In response to this, again we are told, there are no
16 earlier versions of the program; they don't exist.

17 Mr. Canada asked on December 12, the earliest versions
18 of the programs, including any application software. Again,
19 we are reassured that nothing exists at New Century that
20 predates the programs as they had been produced in July,
21 which was the earliest dates that they had ever -- that
22 they had been produced in July of 2003.

23 So then we go on to December 12th -- I'm sorry, the
24 4/29 e-mail from Norment to Darkow and McCarthy. And this
25 is important, I think, Your Honor, because one of the things

1 that they were constantly telling us after the Norment
2 analysis came to light and we filed a motion for contempt
3 that Norment had access to LoanForce, what they were telling
4 us and what they actually continued to tell us is that they
5 didn't know where this came from, they didn't even know
6 where Mr. Norment ever found it.

7 But here we have an e-mail from Mr. Norment on 4/29/03.
8 It says, "19 servers were imaged, all of which were Retail
9 IT servers. All Retail IT servers were imaged. Total-19."

10 Now, the servers imaged that were not included in the
11 original list of 11 were 8, and included in those 11 were
12 the Nitrogen server.

13 Next slide, please.

14 When Haynes & Boone produced us the hard drive, which
15 the Court has in evidence, we looked on the hard drive, and
16 right there on the hard drive on the Nitrogen server sits
17 LoanForce Client.

18 So we don't know where the unlabeled, no file
19 name printout that was buried in the production and
20 misrepresented to be something other than what it is
21 came from. But we do know where John Norment's version
22 came from. John Norment's version came from the Nitrogen
23 server.

24 Let's go to the next slide.

25 And here on 12/19/2003, Mr. Norment writes to Ms.

1 Camina, "I have found a script that seems to be the creation
2 of the LoanForce database dated 11/9/2000. The file is
3 called Full LoanForce Database Script ... and is 904 KB."

4 So on December 19th, Ms. Camina knows that the chief
5 technology officer of New Century Mortgage has found a copy
6 of enjoined software. She knows now three things: The
7 purge never took place. She knows now that the Preliminary
8 Injunction has been violated. Even if it's not an
9 intentional violation at this point, the New Century chief
10 technology officer has access to LoanForce code. And he
11 also has access to material and information that has been
12 ordered--ordered--produced by the arbitrator and that she
13 has agreed to produce.

14 Next slide.

15 Now, the exchange with Norment goes on and notice that
16 Barry Barnett is also copied on this exchange. In response
17 to Mr. Norment's discovery of LoanForce, Ms. Camina called
18 Udo Pooch on the phone and talked to Udo Pooch and told him
19 John Norment has found some software and he believes it's
20 the original version of LoanForce.

21 And Pooch responds, well, I've got this
22 Prospect_AnyLoan.sql version that we think is LoanForce.
23 So why don't you -- why don't you have Norment send it to
24 you and you can send it to me, and I'll compare the two
25 and see if this 11/26/2000 version of the Prospect table,

1 is what that is, is the same as the 11/9/2000 version.

2 Now, Ms. Camina at this point in time understood not
3 only has it been ordered produced, not only have I agreed
4 to produce it, not only am I under a duty now to inform the
5 Court and my opponent that the Preliminary Injunction has
6 been violated, not only am I under a duty to the Court and
7 my opponent to let them know that the purge I represented
8 never really took place, I've now discussed it with a
9 testifying expert.

10 And a discussion of the document and the document's
11 contents, maybe they argue that's not the same as providing
12 it to the expert. Maybe their argument is if you read the
13 expert a document, you haven't provided it to him because
14 you didn't send it to him, I don't think that's the law.
15 But, anyway, she clearly had a discussion with Udo Pooch.

16 Now, in her deposition -- let's go to the next slide.

17 "Q. Exhibit 14 is an e-mail from you to John Norment, copy
18 to Barry Barnett. And you're saying Pooch's file is called
19 Prospect_AnyLoan.SQL dated 11/26 and is 105 kilobytes.

20 "A. Right.

21 "Q. Pooch suggested you--meaning Norment --

22 "A. Uh-huh.

23 "Q. -- the person you're addressing this to, send your
24 file to me and then I can send it to him so he can compare
25 the files and tell us what the differences are.

1 "A. Right.

2 "Q. How could Pooch not have been aware of the November 9
3 scripts but suggests that it be sent to him so he can
4 compare it to the November 26th Prospect table?

5 "A. That's not what he's saying here. What he's saying
6 is Pooch suggested you send your file to me, and then I
7 send it to him so he can compare the files and tell us
8 what the differences are. What I told Dr. Pooch is we
9 found the file and we didn't know what it was. It was
10 inconsistent with what he had told me.

11 "Q. So you were discussing the Full LoanForce Database
12 Script.SQL file with Dr. Pooch?

13 "A. I did not describe it in that way, no.

14 "Q. I didn't ask you if you described it to him in that
15 way. I asked you whether you discussed that file with the
16 Norment discovery with Dr. Pooch. Did you discuss it or
17 not?

18 "A. What I said to Dr. Pooch is, We found a file and we
19 don't know what it is. And he suggests to me, Well, one
20 way to figure it out is for you to send it to me so I can
21 compare it against the other files that we have.

22 "Q. Well, now, wait a minute, Ms. Camina. If you didn't
23 tell him what you thought it was --

24 "A. No.

25 "Q. -- why would he be offering to compare it to the

1 Prospect_AnyLoan.SQL file?

2 "A. That's not what he says.

3 "Q. Pooch suggested you send your file to me and then I
4 can send it to him so he can compare the files --

5 "A. Uh-huh.

6 "Q. -- and tell us what the differences are. Pooch's
7 file is called Prospect_AnyLoan.SQL.

8 "A. Uh-huh.

9 "Q. So that's one of the files that's going to be
10 compared. Right?

11 "A. I -- I don't know that that's true, no."

12 Now, Your Honor, this goes back to the complete
13 lack of remorse and continuing cover-up of what happened.
14 Ms. Camina knew in her deposition that if she admitted that
15 she had provided Pooch this file or discussed this file
16 with him, that that was another basis for its discovery.

17 So she has to make the ridiculous argument that she
18 called Dr. Pooch and said, "We found a computer file," and
19 then he said, "Okay, send it to me and I'll compare it to
20 the Prospect table of a LoanForce Database Prospect table."
21 Of all the -- of all the code involved in this case, 16
22 programs, hundreds of subregistries, he just happened to
23 pick the one that you would need to use to compare to a
24 LoanForce script, and yet she actually says, "I didn't tell
25 him it was a LoanForce script. I didn't discuss it with

1 him. He just magically pulled that choice out of the air."

2 That goes again to the continuing arrogance and
3 cover-up of what's going on here.

4 Now, next, we now see why she was so hesitant to talk
5 about it in her deposition, because even at the time, John
6 Norment e-mails her back and says, "My only hesitation is
7 that now it must go to the other side. Same with my Excel
8 spreadsheet."

9 This is the earlier part of the screen in the famous
10 yikes e-mail where she responds, what Excel spreadsheet,
11 and he talks about the Excel spreadsheet, the Norment
12 analysis where he compared the 2003 -- April 2003 version
13 of LoanForce to LoanTrack. And that got discovered, and,
14 of course, then the whole issue of how did John Norment
15 get access to the April 2003 version of LoanForce and why
16 did he have it in violation of the Protective Order and in
17 violation of the Preliminary Injunction.

18 So there was something else that Norment had. Norment
19 didn't only have the April 2003 LoanForce code in the
20 Norment analysis that caused the original uproar. He also
21 had this November 9th version which you'll see that they
22 carefully covered up and blatantly misrepresented to the
23 Court Norment's activities.

24 So, in the alternative, Ms. Camina writes Norment back,
25 "Alternatively you can talk to Pooch ... and maybe figure

1 out what your file is. Then we can decide if it helps and
2 want to make this file available to the other side."

3 This, again, goes straight to the core of who Ophelia
4 Camina is. What we'll have you do is you can talk to Pooch,
5 you can tell him all about what's in this document, you can
6 describe the document to him, you can go over the document
7 with him, and we won't provide it to the other side unless
8 it helps.

9 And, again, what is this document? It's a version of
10 LoanForce, code that she has in writing agreed to produce,
11 code that she has been ordered to produce, every single
12 version, code that at this point in time she doesn't
13 believe any version of this code has been produced, and
14 she's actually having a discussion with her client about
15 ways to get it to an expert without really getting it to
16 him or at least having no trail of getting it to him, we'll
17 talk to him about it, and then only if it helps will we
18 give it to the other side.

19 And, of course, it never was given to the other side
20 because it didn't help. And we'll see that a little bit
21 later.

22 So, next--and this is important--the date here really
23 needs to be noted, December 22nd, 2003. This is the day
24 before John Norment's deposition in California.

25 The day before his deposition he says, "I have found

1 a script that seems to be the creation of the LoanForce
2 database...." Now, at this point in time Ophelia Camina
3 has no doubt that a chief technology officer of her client
4 believes that what he's found is the creation of the
5 LoanForce database. "This file is called Full LoanForce
6 Database Script.sql." It's pretty clear what this is.
7 And he's gone ahead and he's done an analysis of it.

8 Now, this analysis is not the Norment analysis that
9 was on the spreadsheet. This is a separate analysis. This
10 is a comparison of the 2000 version of LoanForce to the
11 2003 version of LoanForce.

12 And what we have here, he says, 1414 tables exist in
13 the April 2003 database. 549 columns in the table Prospect.
14 30 columns in Prospect do not appear exactly in the 2003
15 version. So the 549 columns, only 30 of them do not appear
16 exactly in the 2003 version. 519 are exact copies. All of
17 the other 93 tables are identical.

18 So he's telling her, what I have is identical in large
19 part to the 2003 version of LoanForce. She knows at this
20 point this is all or part of LoanForce, this is a version
21 of LoanForce.

22 He also says the 2003 --

23 THE COURT: If I can interrupt just for a second
24 just so we're all on the same page. This is the description
25 of the database structure. This is neither the application

1 code nor the server code.

2 MR. SHORE: Correct. This is the core issue in
3 the case. This is the SQL database scripts. SQL database
4 scripts, the -- the -- the allegation of what was copied.

5 THE COURT: I don't know because I haven't looked,
6 but normally you would expect that the SQL script describing
7 the database structure would be a very small percentage of
8 the aggregate application when you include both the server
9 and the client code. Is that correct?

10 MR. SHORE: Well, the -- talking about the
11 application code?

12 THE COURT: Yeah.

13 MR. SHORE: Yeah. This is -- there is no
14 application code involved in this analysis at all. None.
15 This is only -- in fact, the only thing that the lawsuit --
16 or the arbitration or the lawsuit involved was the copying
17 of database code, database SQL tables, columns, statements.

18 THE COURT: Okay.

19 MR. SHORE: So -- and then he's saying, "All of
20 the other 93 tables are identical. The 2003 Prospect table
21 as 636 columns of which 519 existed in 2000." So, in other
22 words, five out of six, the identity of these two programs,
23 the 2000 version of LoanForce that he found on a server, on
24 the Nitrogen server, and the 2003 version of LoanForce that
25 was the latest version of LoanForce that New Century claims

1 they used.

2 So then you go on, "If this is truly the November 2000
3 database, then significant (33%) changes were made....,"
4 meaning, 67 percent of it, two-thirds of it, is identical
5 which is reflective -- actually if you do the percentages
6 between identical tables and columns, it's more than
7 two-thirds identical.

8 So Ms. Camina gets this the day before John Norment's
9 deposition.

10 Now, also on December 23rd -- and the times on these
11 e-mails because of how Outlook works and also because one
12 was in Central time and the other is in Pacific time, so the
13 times -- all of these are in your notebook or are in the
14 evidence and they are actually shown to be in progression
15 in a string. So we know which one came after which.

16 So, "Send it to me and we can have Pooch compare
17 against what he has from PSS." And she asks, "Where did
18 you find this?"

19 Again, this is -- now we're on the day of his
20 deposition. And it's sent from her Blackberry. Apparently
21 she had just landed in California. His deposition was in
22 California in the afternoon, and her Blackberry is still on
23 Dallas time. This would have -- the actual time would have
24 been 12:25 p.m. Pacific time because his deposition started
25 at 1:00. I mean, you'll see that here in a minute.

1 So, next, Norment e-mails her back, LoanForce in 2000,
2 is attached. "It was found in a directory on a server we
3 had not previously reviewed."

4 Now, we know -- again, this is going to come back to
5 the purge. We have the old e-mail where it says, we looked
6 at these 11 servers and then here's eight more that I don't
7 think anything is on but they're part of the Retail IT
8 LoanForce program. One of those servers that was the eight
9 that supposedly they never looked at was the Nitrogen
10 server. That's the server that he's referencing.

11 Next. Hang on a second.

12 So right now what we have is we have Ophelia Camina,
13 the day before John Norment's deposition, gets an e-mail
14 from John Norment fully describing what he found on
15 December 19th, showing that it is identical in large part
16 to the November -- I mean, the April 2003 version of
17 LoanForce.

18 He then confirms it in two more e-mails to Ophelia
19 Camina when she lands in California to defend him in his
20 deposition. In the deposition -- and, again, remember,
21 this is after the Norment analysis brouhaha had begun. It
22 was important to us to find out, what does Norment have
23 access to? What has he been using, the chief technology
24 officer?

25 So one of the things that we asked Norment with

1 Ophelia Camina sitting there is, do you have any access to
2 any part of LoanForce? And this is the testimony he gave
3 with Ophelia Camina sitting next to him:

4 "Q. Is there a copy of the LoanForce database software,
5 all or part, that you have access to today?

6 "Ms. Camina: Other than on the images or the backup
7 tapes.

8 "Mr. Shore: Yeah, other than on the images or the
9 backup tapes.

10 "A. No.

11 "Q. All right."

12 So their position was he only had access to the April
13 2003 version that was restored from backup tapes to help
14 them in the litigation; he didn't have access to anything
15 else.

16 She sat there when he was asked the question, Do you
17 have access to any version, all or part, of the LoanForce
18 database today? And she interrupts and she says, Other
19 than what's on the backup tapes? I said, Other than what's
20 on the backup tapes. He answers, "No." He commits perjury
21 with her sitting there knowing that she has on her Black-
22 berry and on her e-mail from the same day a description of
23 a LoanForce database he found on a server that had not been
24 previously reviewed, according to him.

25 Now, again, going to the next slide, this is what she

1 had to say about this.

2 "Q. What is the date on Exhibit 16?

3 "A. December 22nd.

4 "Q. And who's it from?

5 "A. John Norment.

6 "Q. Who's it to?

7 "A. Me.

8 "Q. Now why don't you read into the record what John
9 Norment wrote you on December 22nd, the day before he
10 testified under oath in your presence that he had no
11 access to LoanForce database software, all or part.
12 Just read the e-mail into the record.

13 "A. I have found a script that seems to be the creation
14 of the LoanForce database dated 11-9-2000, 7:33:38 p.m.
15 The file is called Full LoanForce Database Script.SQL and
16 is 904 kilobytes.

17 "Paragraph 1, it has 2153 columns and 96 tables. It
18 has two, quote, duplicate tables called ProspectActivity
19 and ProspectOldPW which I removed from my analysis, so the
20 remainder has 1444 columns in 94 tables. 1a, MarketingSource
21 has 13 columns. There are no tables called ActivityLog,
22 DailyBatch, DailyTrans. 2, Of these, 1414 Table_Column
23 exist in the April 2003 database. DB -- I think database.
24 549 columns are in table Prospect. 30 columns in Prospect
25 do not appear exactly in the 2003 version. All the other

1 93 tables are identical.

2 "Paragraph 3, In the 2003 version of the DB, there are
3 1826 columns in XX tables. 412 column did not exist in year
4 2000. The 2003 Prospect table has 636 columns of which 519
5 existed in 2000. There were at least 23 tables completely
6 added in the 2003 version, excluding temp tables. Most
7 notably, ActivityLog, DailyBatch, DailyTrans.
8 MarketingSource exited in 2003 with 13 columns and in 2003
9 with 26 columns.

10 "Conclusion: If this is truly the November 2000
11 database, then significant 33 percent changes were made
12 between 2000 and 2003.

13 "I would send numbers 1 and 1a above to Dr. Pooch so
14 that he can verify how close my schema is to the one he
15 has.

16 "Q. All right. Well, let's go back and let's look at
17 the deposition question --

18 "A. Uh-huh.

19 "Q. -- and the answer that he gave.

20 "A. Uh-huh.

21 "Q. Is there a copy of the LoanForce database software,
22 all or part, that you have access to today?

23 "And his answer: No.

24 "A. After it's limited, yes, that's correct.

25 "Q. Yeah. Other than on the images or backup tapes,

1 which this clearly was not.

2 "A. Uh-huh.

3 "Q. Yeah, other than on the images or backup tapes.

4 "Answer: No.

5 "A. Right."

6 So, again, that is in our view, why would she do this?
7 Right now we already had a motion for contempt on file. We
8 were already litigating the fact that he had access to the
9 2003 version. If it comes out that he also has access to
10 a version on a server that has not been looked at and it
11 happens to be a Retail IT server, that means there's no
12 purge. That means that the Preliminary Injunction was
13 limited by them through fraudulent arguments. That means
14 that the Preliminary Injunction is being violated because
15 he has access to LoanForce and they want -- they want the
16 access to continue because, as you're going to see, the
17 Nitrogen server he found it on was a development server for
18 software developers and a QA, quality assurance, server.

19 That is subornation of perjury. And there's actually
20 a case closely analogous to this. It's the Tedesco versus
21 Mishkin case. An attorney suborned a witness's perjury by
22 allowing the witness to testify facts the attorney knew
23 were false and failed to correct the false testimony.

24 There is no doubt that Ophelia Camina knew on the 23rd
25 that John Norment had access to all or part of the LoanForce

1 2000 version of the database. She allowed him to testify
2 denying access to exactly that. She did it because she
3 didn't want an injunction expanded, she did not want
4 contempt, she did not want to face the Court in what she
5 knew would be collateral litigation over what they had done
6 before, it all would have come unravelled. Their plans
7 would have come unravelled if Norment's access to this
8 version came to light. So they suppressed it, they hid it,
9 and they allowed him to lie about it in his deposition

10 Here's the testimony: "Is there a copy of the
11 LoanForce database software, all or part, that you have
12 access to today?

13 "Other than on the images or the backup tapes?

14 "Yeah. Other than on the images or backup tapes."

15 The witness: "No."

16 There could not be a clearer case of an attorney
17 allowing a witness to lie in a deposition, knowing that
18 he's lying and never correcting it to avoid contempt, to
19 avoid collateral litigation that would have unravelled
20 their entire scheme.

21 Next.

22 Again, the 11/2000 version in Norment's possession
23 would have demonstrated they stood in contempt of the
24 Preliminary Injunction, would have demonstrated the
25 purge as represented to the Court never occurred, and

1 demonstrated that the 4/03 version was two-thirds identical
2 to the version of LoanForce delivered to New Century.

3 And that's important because the tables described in
4 Norment's e-mail were the tables at issue in the litigation
5 that New Century was claiming its programmers wrote.

6 Now, I'm not sure she was aware of that at the time
7 because she'd only had a couple of days. But if you go back
8 and look at the arbitration transcript, the tables Norment
9 describes in the e-mail as being identical are the tables
10 that were the core of the lawsuit where the arbitrator said
11 we couldn't prove who wrote them because we didn't have the
12 original as-delivered version to show him.

13 Go ahead.

14 So now what do we do with this? We've got it. So
15 Barry Barnett, Ken Gardner, Mark Anderson are all brought
16 into the loop. She tells them on December 27, "John Norment
17 found the below on a server that had not previously been
18 searched."

19 Now, this is important. Remember--and we'll get to
20 this in a little bit on the purge--Udo Pooch supposedly had
21 searched -- personally supervised the search of all Retail
22 IT servers. There were only 19 of them. And now they're
23 admitting that the Nitrogen server had never been searched,
24 a software development server for the Retail Division of
25 New Century Mortgage, a server that had also been used in

1 production.

2 So "This is probably something that needs to be
3 forwarded to Pooch....," which I think it was forwarded to
4 Pooch. We can't find the actual e-mail because Pooch or
5 someone at Texas A&M destroyed all the e-mail records
6 between Pooch and A&M sometime in the last two years.

7 So to roll out the LoanForce database, "The date of
8 the below is about 2 weeks prior to the one received from
9 Shore Deary.... Someone needs to follow up on this piece
10 of evidence to look at it, and decide what to do with it."

11 There is no decision on what to do with it. You've
12 been ordered to produce every version of it. You've agreed
13 to produce every version of it. You talked about it to
14 your expert. Your client CTO has done an analysis of it
15 in violation of the Preliminary Injunction and in violation
16 of the Protective Order, and you're actually litigating
17 over a different analysis he did of the same type.

18 There is no decision. There's no decision for an
19 honest, ethical lawyer. There's no decision. You turn it
20 over. You turn it over immediately.

21 So then also on the 27th of December, Ophelia Camina
22 writes Barry Barnett, "Attached is a copy of the script ...
23 Norment found which contains (he believes) an 11/9/2000
24 version of the LoanForce Database. This is detailed in
25 my prior e-mail forwarding John Norment's comments...."

1 In the prior e-mail in the string is Norment's analysis of
2 the -- of the code, a comparison of the 2000 code to the
3 2003 code.

4 So Barry Barnett also had Norment's analysis in the
5 same e-mail string as well as he's now being sent or
6 forwarded a copy of the code.

7 "I recommend we send to Pooch after someone verifies
8 this is what it is." Well, again, I guess her argument is
9 on the 23rd it hadn't been verified it was a version of
10 LoanForce, although her client had told her that 93 tables
11 were identical to the -- to the April 2003 version of
12 LoanForce and 500 out of 600 columns were identical. She
13 knew what this was.

14 Next.

15 Then Barnett says -- I mean, in response, Ken Gardner
16 says, "Aren't we going to invite a renewal of a motion to
17 compel us to look at all of the servers, not just the 19
18 that New Century Retail used? Or did John find this ... on
19 one of the 19 servers?"

20 Well, he did find it on one of the 19 servers. He
21 found it on the Nitrogen server.

22 And, again, "Aren't we going to invite a renewal of
23 a motion to compel...?" Why would we want to produce
24 something that's going to have -- cause them to file a
25 motion against us? Why would we want to produce something

1 that might cause us a problem?

2 That is not how the law is supposed to be practiced.
3 You don't produce documents that you've been ordered to
4 produce, that you've agreed to produce, that you're under a
5 duty and obligation to produce, that you've talked to your
6 expert about, you don't decide to produce items like that
7 based upon whether or not it's going to cause a motion to
8 be filed.

9 Now, Mr. Barnett then says, "Let's discuss." I don't
10 want to put anything else in writing, it's time to have an
11 oral discussion, this is a hot topic.

12 Now, Mr. Barnett claims that he doesn't remember this
13 discussion ever taking place. At least he didn't remember
14 it taking -- and this, again, the "let's discuss," is on the
15 5th of January. We're coming up closer to the arbitration
16 which I think started on the 21st.

17 So then--the next slide--of January 6, Anderson sends
18 Barnett, "Attached is the file Norment sent us and OFC
19 recommended ... we send to Pooch." Either the discussion
20 has already taken place and he wants to see it, which I
21 think is a logical inference, or the discussion is about to
22 take place and he wants to see it to have the discussion.

23 The next e-mail.

24 After -- here's two e-mails with two different
25 attachments. He had trouble opening an attachment so he

1 ended up having it sent to him twice in two different
2 formats. "I guess this is what we ... have produced."
3 "Have we produced this?" He's asking.

4 Now, I will represent to you, Your Honor, I have looked
5 hard, and I'm not -- I -- I can't say I've looked at every
6 single piece of paper, every single e-mail again. But I've
7 looked at a lot of e-mails in this case produced by Susman
8 Godfrey. I've looked at a lot of e-mails produced by New
9 Century. This is the only piece of evidence in the entire
10 case that Barry Barnett wanted to discuss with someone about
11 whether to produce it, and it's the only one where he sent
12 two e-mails, or even one e-mail, saying, have we produced
13 this? I guess this is what we produced.

14 This was a key, important piece of evidence, and they
15 all knew it. It wasn't just a key and important piece of
16 evidence. It was evidence of their misconduct.

17 Now, Mr. Barnett claims -- although there's e-mails
18 about wanting to have a discussion, there's e-mails about
19 multiple efforts to get him a copy he could open, there's
20 multiple e-mails where he's inquiring about whether or not
21 it's been produced, his position is now, I don't know who
22 made the decision not to produce it, I don't even know if
23 a decision was made, this just fell through the cracks.

24 That's not credible that the piece of evidence that
25 falls through the cracks is not the only one that the lead

1 lawyer, a member of the Susman Godfrey executive committee,
2 is inquiring about repeatedly. That's not the piece of
3 evidence that falls through the cracks. But here is what
4 Mr. Barnett has to say about this:

5 "Q. Who made the judgment not to produce the November 9,
6 2000 version of LoanForce?

7 "A. As best I can tell, Mr. Shore, it fell through the
8 cracks."

9 And then Ms. Camina, sort of playing along the party
10 line, there's no explanation for it so the explanation is
11 there's no explanation.

12 "Q. ... back to the November 9, 2000 version. Who made
13 the decision not to produce that in the litigation?

14 "A. I don't think that decision was ever made."

15 So they're discussing it, they're inquiring about it,
16 they're asking their paralegals has it been produced,
17 repeatedly, and yet nobody made a decision, nobody decided
18 to produce it, nobody decided not to produce it, this highly
19 important piece of evidence, this highly important document
20 is the one and only document they were all discussing and
21 talking about repeatedly during this period of time that
22 the contempt proceedings were going on, that fell through
23 the cracks.

24 Now, around this same time on the 30th, he is
25 corresponding with you, and he is corresponding with you

1 about the Norment analysis. And he says in one of those
2 letters on the 30th, "We take allegations of improper access
3 to confidential material seriously and will follow up to be
4 sure no one has had improper access to the material that is
5 subject of the Protective Order or the Court's injunction."

6 So he's telling you on the 30th, after he knows that
7 John Norment has access to a version of LoanForce that he
8 has seen described on December 29th in an e-mail, seen
9 described as a copy, a substantial two-thirds copy of the
10 2003 version of LoanForce, so the 2003 version, two-thirds
11 of it is copied from the November 2000 version, he's seen
12 that, he tells you that they're going to follow up to be
13 sure no one's had improper access to material subject to
14 the Court's injunction.

15 He didn't need to follow up. He knew they had
16 material subject to the Court's injunction in the hands of
17 John Norment. He never mentions to you or to us or to the
18 arbitrator a single time the existence of the November 9,
19 2000 version of LoanForce that John Norment has access to
20 after telling the Court that they're going to leave no
21 stone unturned to tell you all about John Norment's access.

22 And, again, in the letter of January 16th to the Court,
23 "I am writing to update the court on the results of the
24 investigation we have initiated into the circumstances
25 surrounding John Norment's access to and use of LoanForce

1 database materials for the purposes of assisting counsel
2 with the defense against claims in the pending arbitration."

3 Well, on December 16th, if you're going to tell the
4 Court about John Norment's access to LoanForce for the
5 purposes of assisting counsel, why would you not give the
6 Court information about his access to LoanForce found on
7 the Nitrogen server that he did a detailed comparison of and
8 sent the detailed comparison to counsel on December 29th?

9 Now, did he send that detailed comparison to counsel
10 for some purpose other than assisting counsel? Was it a
11 hobby? Is that how they're going to try to get out of this?
12 Was it something that Norment just -- well, maybe what it
13 is, it wasn't helpful. So if it wasn't helpful to them,
14 it didn't assist them. So maybe that's the argument.

15 Maybe the argument is, we didn't -- we can tell you
16 this, we can blatantly misrepresent to the Court the
17 circumstances of John Norment's access to the November 9,
18 2000 version of LoanForce and -- and not tell the Court
19 about his comparison of those two versions that he sent
20 to us in an e-mail because it didn't assist us, it hurt us.

21 I can't think of any other, you know, semantic reason
22 that would excuse this as a blatant misrepresentation to
23 the Court to cover up John Norment's access to the version
24 of LoanForce that he was enjoined from seeing.

25 And there is no dispute that John Norment was enjoined

1 from seeing the November 9, 2000 version of LoanForce on a
2 server. There was no dispute that that was covered by the
3 injunction.

4 In the same letter, "Third, Mr. Norment's work on
5 the comparison of code appears to have evolved out of his
6 preparation of schemas represented by Dr. Stonebraker."
7 The November 9, 2000 comparison to the April 2003
8 comparison had nothing to do with Dr. Stonebraker. Dr.
9 Stonebraker's name is not on it. It was never forwarded
10 to Dr. Stonebraker. Dr. Pooch's name is all over it,
11 talking about sending it to Dr. Pooch.

12 But this is -- again, they're trying to mislead the
13 Court into believing that Norment's only access to LoanForce
14 was from the restored backup tapes, the April 2003 version.
15 There is no other explanation for what they are trying to
16 convey to the Court, and what they are trying to convey is
17 false.

18 And, again, go back to that 22 e-mail--I found the
19 script, and all the description and comparison--this is
20 what Barry Barnett had in an e-mail string in e-mails to
21 him on the same day -- or actually on the 29th this e-mail
22 was forwarded to Barry Barnett. He talked about it twice
23 with underlings, e-mailed underlings about it, was well
24 aware of it prior to the time he wrote the Court on
25 January 16th.

1 Let's go to a February 9th hearing where he is again
2 representing, "The second statement is Dr. Pooch's statement
3 in his amended declaration where he says, quote, no New
4 Century retain IT personnel"--that should be retail IT
5 personnel--"had access, close quote, to the LoanForce
6 database and that he personally, quote, supervised and
7 observed the deletion of these four databases--LoanForce,
8 LoanTrack, LFMoon, and LTKMoon."

9 So on February 9th, he's again coming to the Court and
10 reiterating to the Court in a hearing that he still believes
11 LoanForce was cleansed by Dr. Pooch from the New Century
12 servers. This is after he knows that John Norment's done
13 an analysis of it, after he knows a version has been found
14 on a server, after he knows the cleansing is a -- is a
15 farce, he's still telling the Court that a cleansing took
16 place and that he has confidence in it.

17 Next.

18 We have more evidence on the intent. On 12/3/2003,
19 we're talking -- there is a different subject, the Loan-
20 Track-2 transaction history and .mdf format, that Ophelia
21 Camina -- and, again, the To line is gone, but we know it's
22 Mark Malovos. Who else was maybe copied on it, we don't
23 know. But she says, "... just so you know, my view at
24 this point is that we should look for and produce what
25 they specifically identify as missing and we agree or we

1 are ordered to produce."

2 So unless they know it exists and demand it and then
3 we're ordered to produce it or agree to it, discovery for
4 them is over. We're not giving them anything else that's
5 not helpful to us.

6 That's not how you conduct discovery in federal court,
7 but it certainly indicates the intent on the part of Ophelia
8 Camina that discovery is now, as of December 3rd, a one-way
9 street. The only thing the other side gets is what's
10 helpful to us.

11 And that's a follow-up to where she says, "We'll send
12 this code to Pooch, and if the comparison is helpful, we'll
13 send it to the other side." It wasn't helpful, so we didn't
14 get it.

15 Now, did this make a difference? And, again, all you
16 have to do is go to the award.

17 "Nor was the LoanForce Product as originally delivered
18 to New Century Mortgage offered into evidence at the Final
19 Hearing, and no comparison were made directly to the 'code'
20 of that original Product. Additionally, the differences
21 between the original version and the version on Positive
22 Software's server in December 2002/January 2003 were not
23 identified at the Final Hearing. Also not identified,
24 were the specific portions of LoanForce which came from
25 TeleTrend."

1 The earliest portion of the code that they gave us was
2 December 2002/January 2003. They told us that even October
3 31st, 2001 wasn't available. This was the -- and repeatedly
4 Ophelia Camina tells us, these are the earliest versions you
5 can get.

6 So we use the earliest versions in the trial, and the
7 arbitrator said that doesn't work because we don't know how
8 those versions changed from the earliest versions which you
9 did not have and did not put into evidence.

10 And let's again look at Barry Barnett's declaration in
11 the show cause proceeding: "For reasons only it can answer,
12 PSS chose not to introduce its own copy of November 2000
13 software, which is listed as Exhibit R-651, into the ...
14 record."

15 Well, he didn't give you a copy of R-651. He didn't
16 even describe R-651 other than to say it's the same as the
17 LoanForce -- original LoanForce database. Well, now, you
18 know, we know R-651 is a single table, and it's a single
19 table that was prepared for a company called AnyLoan. It
20 is very, very similar to that one table in the original
21 LoanForce database, we now know. That is not a copy of the
22 LoanForce database. It's a copy of a single table, the
23 Prospect table. It's 104 kilobytes. The original version
24 of LoanForce is 905 kilobytes, almost -- well, nine times --
25 almost nine times larger.

1 Again, this is an effort to mislead. Now, of course,
2 this was filed under seal believing that no one would ever
3 see it, it would never see the light of day. When it was
4 unsealed and we read this, quite frankly, we were astonished
5 at the audacity.

6 And let's see -- take a look at what Barry Barnett had
7 to say about this in his deposition:

8 "Q. So when you signed a declaration characterizing the
9 contents in Exhibit R-651 to a federal judge in a show
10 cause proceeding, you hadn't actually looked at it?

11 "A. I had not looked at it in detail, that's right.

12 "Q. And you hadn't had an expert look at it?

13 "A. I don't know.

14 "Q. And you didn't attach a copy for the judge to look at?

15 "A. I did not at that time do that."

16 So, again, he characterizes it -- he doesn't
17 characterize it as a part of LoanForce, he doesn't
18 characterize it as something similar to LoanForce. He
19 says that we had R-651 and it was a -- it was -- it was
20 the same as the November 9, 2000 version of LoanForce.

21 Just another instance of a lack of remorse and more
22 attempts to get out of the problem that they caused for
23 themselves.

24 So, in summary, on the November 9, 2000 version,
25 there's a duty to produce every version of that software,

1 including the version to Norment discovered on a server,
2 an active server.

3 Susman Godfrey falsely claimed that no earlier versions
4 of LoanForce existed when it was clearly on the Nitrogen
5 server and John Norment clearly had a copy of it. They
6 not only misrepresented this to us, they misrepresented it
7 to the arbitrator and they misrepresented it in Exhibit 1
8 which -- again, Exhibits 1, 2, 3, and 4 is a compliance
9 with discovery that they filed and the actual code. And
10 we would offer those into evidence.

11 MR. BECK: No objection.

12 THE COURT: They're admitted.

13 MR. SHORE: Camina allowed John Norment to commit
14 perjury when he denied having access to any version of
15 LoanForce, all or part or any part of it, other than the
16 April '03 version on backup tapes. They compounded that
17 error by failing to correct the false testimony at any
18 time ever prior to the arbitration or after.

19 Respondents misrepresented Norment's access to
20 LoanForce in correspondence to the Court, repeatedly telling
21 the Court that his only access came from backup tapes that
22 he got from the Legal Department in June of 2003 and had
23 restored, specifically did not tell the Court that he had
24 access to a version on a server that he discovered on
25 December 19th, and they did it knowingly and intentionally.

1 As of 12/3/03, a conscious decision was made by Camina
2 not to produce any additional material in the litigation
3 unless it was first specifically identified as missing by
4 her opponent and they were ordered to produce it unless, of
5 course, it was helpful to their side.

6 When Barnett learned that Norment had discovered an
7 11/9/2000 version of LoanForce, his first reaction was to
8 ask his litigation team twice, have we produced this, is
9 this what we produced?

10 After Kenneth Gardner suggested that producing the
11 Norment version would cause collateral litigation and motion
12 practice because of their past inconsistent statements about
13 its existence and access and a violation, Barnett decided,
14 wait a minute, we need to talk about this.

15 During the contempt proceedings relating to the Norment
16 analysis, Susman Godfrey misled the Court by stating Norment
17 did not have access to any version of LoanForce other than
18 the April 2003 version despite his e-mails to Barnett and
19 Camina and Gardner and Anderson, all of them copied on it,
20 indicating that the 11/9 and 4/03 versions of LoanForce were
21 substantially identical, at least two-thirds identical.

22 Next?

23 Susman Godfrey's concealment of the 11/9/2000 version
24 that Norment had a material outcome on the case as did their
25 concealment of the 11/9 version when they produced it on

1 12/21 -- on 11/21. That is no excuse because, frankly,
2 they told us -- one, they told us what they were producing
3 was what they were currently using. There was no reason
4 at the time not to believe that they -- that they produced
5 what they said they produced.

6 They also produced the code they produced on disk.
7 For some reason, unbeknownst and unknowable right now since
8 we just got it two days ago, they didn't produce the SQL
9 statements.

10 So the idea that suddenly that's a get-out-of-jail-free
11 card for their conduct I think misses the point, misses the
12 point of what they did, it's not credible, and it doesn't
13 excuse their conduct.

14 The next topic I'm going to talk about is the VSS
15 database. There was a duty to produce any databases that
16 included any version of the 16 programs. New Century used
17 Microsoft Visual SourceSafe, or VSS, a version-tracking
18 application that included the databases of all versions of
19 the software, including their logs.

20 THE COURT: You're kind of shifting in your use
21 of the word "database" there, aren't you?

22 MR. SHORE: Well, they were supposed to produce
23 all the 16 programs, including databases. That -- that's
24 true. The VSS would include more than just databases. It
25 would also include application software. And -- and what

1 I mean by database, I mean the database structure, the
2 database code, the SQL code.

3 THE COURT: Okay. I thought you were describing
4 the VSS itself as a database and saying --

5 MR. SHORE: It is.

6 THE COURT: -- when we asked for databases,
7 that should have included VSS because it's a database.

8 MR. SHORE: Right. And we'll go into the
9 discussion or the question, but we also asked for any
10 tools used to create the databases, including databases
11 that included versions of the databases under development.
12 And that's what the VSS is. And this will be hopefully
13 clearer to you as we go through this.

14 A conscious decision was made to suppress the VSS
15 database despite New Century's willingness to produce it.
16 And that decision was made by Barnett and Camina.

17 So let's go back. The "request includes each version
18 and any derivatives, database stored procedures and
19 database schemas modeling." So in other words, the
20 database schema models would include VSS.

21 "Subject to these objections, New Century will produce
22 responsive information ... regarding" -- again, here's their
23 agreement. They're going to produce anything related to
24 LoanForce, LoanTrack, LoanTrack-2, et cetera, including
25 mLAS.

1 We then go to the motion to compel. Again, they were
2 also, even though they agreed, subject to some objections,
3 they were ordered, and all those objections regarding those
4 programs were overruled.

5 So here we go to November 12. And, again, this is
6 the whole time when the versions and what versions of this
7 software was available. "Mark, Mark, and John"--that would
8 be Mark Malovos, Mark Anderson, and John Norment--"below is
9 my proposed letter to Peter Shurn describing what we were
10 ordered to do."

11 So, in other words--let's go to the next slide--they
12 were ordered to produce the VSS or ordered to produce all
13 versions of code.

14 Now, then we get news back from Norment to Camina,
15 "Regarding VSS and versions: We supposedly have all the
16 versions of the programs in VSS." So she is being told
17 on November 12th, we have every version of the programs.

18 "The other side will need the VSS product to read that
19 VSS archive file. If they want it produced in another
20 manner, suggest that they can pay us to do it." So, good
21 news, every version of the software is available, we can --
22 we can give it to them, every version, according to this
23 order from the arbitrator.

24 Next.

25 Then we have a letter from Camina to the arbitrator.

1 "After the telephonic hearing, I contacted Ralph Canada ...
2 regarding production of 'other versions of source code for
3 the 16 items.' New Century does not maintain 'versions'
4 of the items."

5 This is in direct contrast to the great news she got
6 from her client the day before that they had every version
7 of every program, not LoanForce because LoanForce wasn't
8 something they created, but LoanTrack, LoanTrack-2, mLAS,
9 they had every version. She's saying, we don't have any
10 earlier versions other than what we've already given you.

11 Then Norment tells Camina on December 10, "We have
12 supplied the following source code versions." And here's
13 the versions of the source code they provided for
14 LoanTrack-1. And as you see the last one -- you have
15 one for January of '03 for LoanTrack-1 and one or April
16 of '03, Development of LoanTrack-1 started in early --
17 late 2001, early 2002.

18 LoanTrack-2 source code has it again, all 2003.
19 LoanTrack-2 development started in 2002, including the
20 database development was in 2002. Why would you not give
21 the earlier versions from 2002? Because those are the
22 ones that were probably started out as direct copies of
23 the LoanForce database. Those are the ones that -- that
24 showed the template from which you started.

25 mLAS went into production in 4/25/03, and they gave

1 source code only as to April 9, 2003 and November 11th,
2 2003. So they gave the only original -- the only version
3 of the source code for mLAS they gave was a version that
4 existed 16 days before they put it on line.

5 Again, there's no way you can track how the program
6 was developed and what the source of the code was if the
7 one you're getting is the one that starts out right two
8 weeks before they roll it out.

9 So then you -- go to the next slide.

10 "When we created the CDs" -- this is from John Norment
11 again to Ophelia Camina, and this is December 11, 2003:

12 "When we created the CDs, we used VSS to export all the
13 current"--all the current--"versions of the source for that
14 date. I also sent Ophelia the VSS listing of the changes
15 that were made and recorded in the VSS log - but not every
16 version of the program."

17 So she knew on December 11th a couple of interesting
18 things, knew that -- that they had not done every version
19 of the program. And we also know that Ophelia had been sent
20 a listing of the changes. In VSS, a programmer can check
21 out a program, make changes to it, put it back into VSS,
22 and it will keep a log of who checked it out, exactly who
23 did the work and what the changes are from one version to
24 another. That log was not produced.

25 "Within VSS, we actually have every {unaudited} version

1 of every program. If we were to give someone the actual VSS
2 database, then they could use VSS to look at every version
3 and every change that was made." That is what they did not
4 give us. That is what would have been the road map to how
5 those infringing programs were created.

6 Let's go to the next slide.

7 Now, Mark Malovos, the in-house counsel for New
8 Century, understands what this means. The source code road
9 map is available to the other side. "Is that a good thing?
10 More than we are required to do or the same (just easier)?"

11 Well, obviously it was what they were required to do.
12 They were required to produce every version of the 16
13 programs they had, every document related to those programs
14 that they had.

15 So -- and, again, Ophelia -- go back one.

16 And Ophelia Camina is copied on this e-mail, "Is that
17 a good thing?" Notice the date. It's after December 3rd
18 when they have decided that we're not giving the other side
19 anything that they don't already know about, we're not
20 giving them anything unless they know about it, ask for
21 it, and are ordered to give it to us.

22 Next.

23 "If we gave them the entire VSS database - that would
24 be far and above what they requested (or even knew to
25 request)." But--this is Norment to Malovos; Camina is

1 not copied nor Barnett--"I would have no problem giving it
2 to them."

3 So the client is saying, I have no problem giving it
4 up. And this is a nonlawyer that I guess hasn't read
5 the order from the arbitrator that all versions and all
6 documents related to all 16 programs were supposed to be
7 produced. But he said, we can give them the entire VSS
8 database.

9 Next slide.

10 Now we have Malovos and Norment, "How long would it
11 take? If it would be relatively quick, I would say go
12 ahead. If not, let me check with Ophelia first."

13 So before we give the road map, they're going to
14 check with Ophelia. Let's see what happens when they
15 explain to Ophelia that a road map to how all these
16 allegedly infringing programs were created is available.

17 So we have Norment again, "I now have the 'full' VSS
18 file for mLAS.... It would take another 2 days for someone
19 to produce the LoanTrack-2 full VSS. Do you want it
20 produced?"

21 He responds, "I would ask Barry and Ophelia and defer
22 to them on this. I can forward your e-mail if you would
23 prefer that it come from me."

24 So, again, it's fine with the client if we give up
25 the road map, but we were going to check with the lawyers

1 first. And this is December 29, 2003.

2 The next in the string? There's an agenda that's sent
3 around for a teleconference or discussion between Barry
4 Barnett, Ophelia Camina, John Norment, and Mark Malovos.
5 One of the agenda item is, "We should have a complete VSS
6 archive file for LoanTrack-2 and mLAS. This will have every
7 version of every file that was in VSS. My understanding is
8 that we will burn a CD and FedEx to Ophelia to give to the
9 other side." So they're -- this -- this is the agenda for
10 the conference -- the conference call.

11 And then the next e-mail, we have the outcome of the
12 conference call. "Per our conference call on Monday"--the
13 29th; this is Tuesday, the 30th--"upon direction of counsel
14 this task is no longer necessary. I have stopped working
15 on it."

16 So they have the conference with Ophelia and Barry,
17 they tell Ophelia and Barry, we can give them every version
18 of mLAS, every version of LoanTrack-2, we can restore it,
19 give them the VSS database. But, you know what, it's after
20 December 3rd and we're not -- when Ophelia is not giving up
21 anything that we don't already know about unless it helps
22 us -- unless it helps them.

23 So after this conference call, the VSS database
24 disappears.

25 The next topic we have is mLAS. And as you'll recall,

1 Your Honor, when we were talking about the preliminary
2 injunction, it was a desperate, desperate attempt by New
3 Century to avoid the preliminary injunction touching upon
4 mLAS.

5 And to avoid the preliminary injunction touching upon
6 mLAS, the respondents repeatedly assured the Court that
7 mLAS was developed by programmers who never had any access
8 to LoanForce. And the Court in a previous order said,
9 relying on those statements, the Court did not expand
10 the injunction to cover mLAS or LoanTrack-2 based upon
11 the statements from counsel that these were clean-room,
12 no-access projects. Well, now we know that's not true.

13 Here's a 4/21 letter from Barnett to the Court: "As
14 the Court will recall, mLAS was created by programmers who
15 had no access to LoanForce, LoanTrack-1, or LoanTrack-2
16 during the development process and who worked for a company,
17 eConduit Corporation, that was not acquired by New Century
18 until May of 2002."

19 Well, there's two false statements in that letter, in
20 that sentence. One is they leave out the fact that mLAS
21 database was not created by eConduit. It was created by a
22 company called VisionCore. Specifically, it was created by
23 a programmer named Tony Dulkis at VisionCore. And while
24 Tony Dulkis was still working on the mLAS database, he was
25 the database administrator for LoanForce. And we'll see

1 that.

2 In their claim -- this is the statement of claim from --
3 from New Century, signed, entered by Susman Godfrey:

4 "PSS specifically claims that New Century reverse
5 engineered and copied LoanForce and incorporated or will
6 incorporate it in two different software products, LoanTrack
7 and mLAS. New Century or one of its affiliates in fact
8 developed LoanTrack and mLAS independently of PSS and
9 LoanForce. New Century nor any of its affiliates reverse
10 engineered or copied LoanForce software in whole or in
11 part."

12 Let's see the backup for that. Again, the 4/22 letter
13 from Barnett to the Court: "Regarding the new database in
14 mLAS, it was created independently ... and without reference
15 to LoanForce, LoanTrack-1, or LoanTrack-2; again, there is
16 no contrary proof."

17 Well, there was no contrary proof before the Court
18 because the contrary proof was in the possession of New
19 Century and its lawyers, and, of course, New Century and
20 its lawyers were misrepresenting.

21 And here's the e-mail from Monika McCarthy to Pat
22 Rank, the vice president, and Darkow. This is -- notice
23 the date, 4/8/03. This is after LoanForce -- the software
24 subscription agreement had been terminated, this is after
25 the software key had been turned off and demand for the

1 product had been asked for.

2 Ms. McCarthy says, "I also think our attorneys have
3 done a good job covering up the fact that we are continuing
4 to use their database. But, the fact remains that we
5 continue to use their database in violation of their
6 agreement with them (which has been terminated), and
7 this is going to cost you."

8 Now, they, interestingly, on Tuesday filed a
9 declaration from Monika McCarthy saying that she didn't
10 mean what she said, that it was a bad choice of language.

11 Well, Ms. McCarthy is a lawyer. Ms. McCarthy faces
12 disbarment for what she did and what she allowed her lawyers
13 to do. And it's interesting that Ms. McCarthy didn't show
14 up ever to give a deposition, never subjected herself. And,
15 as a matter of fact, in our negotiations in the bankruptcy,
16 she was still working as a consultant to New Century, she
17 insisted on being released.

18 So we'll go to the next slide.

19 Here is a call from Monika McCarthy, transcribed
20 voicemail that Ophelia Camina transcribed: "Hey, Ophelia,
21 Monika calling.... Wanted to let you know that I'm sort of
22 up to speed with all the allegations with regard to mLAS.
23 We've basically decided on our side we're going to go ahead
24 with the implementation and use of mLAS at this point. We
25 have a ... business need to do so and ... realize there is

1 potential liability ..., but, you know, it is what it is
2 and we've gotta, you know, move forward. So give me a call
3 on my cell," and we can discuss it.

4 So Ms. McCarthy, as you'll see later, knew that
5 LoanForce elements were in mLAS. She knew it and she told
6 Ophelia Camina and Barry Barnett that. Otherwise, there is
7 no explanation for the language in the e-mail about how we
8 understand there's a risk if we go forward with this, but
9 we've got to go forward. We're producing billion of dollars
10 a month in loans and, you know, we're not going to put that
11 at risk, we're going to go ahead and violate preliminary
12 injunctions, violate copyrights because the money machine
13 is not going to stop.

14 Next.

15 Ophelia responds: "I got your voice mail yesterday
16 regarding the decision to go ahead and deploy mLAS. I
17 understand that you all have weighed the potential risks
18 versus the business needs in making this decision. Thanks
19 for the update."

20 So, again, the business risk. The business risk is
21 it's discovered that LoanForce is in mLAS and you get in
22 deeper trouble than you would have already been in. And
23 we're going to see that in a minute.

24 So here's an e-mail from Norment to McCarthy, citing
25 basically all the defendants in the law -- the individual

1 defendants in the lawsuit, describing how LoanTrack and
2 LoanTrack-1 or -- or LoanForce elements ended up in
3 LoanTrack-2 and how the fields are the same and that
4 they can redesign it to cover it up. They can redesign
5 LoanTrack-2 to cover it up, but that's going to take time.

6 So instead of redesigning it to cover up the LoanForce
7 code in LoanForce II, they recommend that they redesign it
8 for the next release. Let's not even -- let's not even shut
9 it down for a week to redesign it because that would cost
10 us a week's worth of production. We'll just wait until
11 LoanTrack-2, version 2, comes out and then we'll cover it
12 up, the fact that LoanForce is in LoanTrack-2.

13 Next.

14 And, again, Tony Dulkis works for VisionCore -- this is
15 an e-mail from Camina to Barnett and others: "Tony works for
16 VisionCore and worked on mLAS. While he worked on mLAS he
17 was provided table structures"--of LoanForce--"Tony Dulkis
18 got a printout of some table structures for LoanForce or
19 LoanTrack (he doesn't recall which)." But LoanTrack was
20 also an enjoined program. "Darius Lee sent this to eConduit
21 and he saw it. Tony Dulkis used the Campaign Table and
22 copied some of the field names. He did not copy the
23 database structure. By copying the field names, this
24 necessarily means that you are also copying the type of
25 field"--et cetera--"He estimates that he copied about 3-4

1 of the Campaign fields."

2 And, again, this proves that the creator of the
3 mLAS database had access to, and did some copying, from
4 LoanForce, exactly what they told the Court did not and
5 could not have possibly happened.

6 Next slide.

7 This is an e-mail from Camina to Darkow and McCarthy:
8 "Dr. Pooch did a quick search for me of Tony's name in the
9 source code -- There are comments in the code that reflect
10 names of persons who work on code and the dates they did do
11 it. Here's what Pooch tells me:

12 "mLAS: Tony appears to be the principal author of
13 mLAS." And, again, Tony works for VisionCore, not eConduit.
14 "His name is all over it. Not surprising but troubling
15 given the below.

16 "LoanForce: There are many references to Tony in
17 LoanForce, including in the LoanForce database. A few are
18 in January of 2003," before they told the Court that no
19 one had any access to LoanForce who worked on mLAS. "But
20 most are in March and April"--also before they told the
21 Court that no one had access to LoanForce who worked on
22 mLAS--"after the lawsuit was filed. (Not a smart decision
23 in hindsight)."

24 So after the lawsuit was filed, an mLAS programmer has
25 his name all over and all through LoanForce. Did they ever

1 correct their misstatements to the Court? No. They didn't
2 correct the misstatements to the Court because the e-mails
3 between Monika McCarthy and the voicemails between her
4 and Ophelia Camina indicate Camina knew this, knew that
5 LoanForce was in mLAS, but there was a business decision
6 to go ahead and do it.

7 Next.

8 This is, again, Monika McCarthy writing to Pat Rank,
9 and it's -- it's a July 7, '03 e-mail: "... the fact that
10 some tables and fields were used from LoanForce in LoanTrak
11 1 & 2, and mLAS, not maliciously, but it did occur -- and
12 these transmission occurred and we will have to figure out
13 how to value this use."

14 So, in other words, again, a follow-up to what we
15 already know: LoanForce was in mLAS, the lawyers knew it
16 was in mLAS, the client knew it was in mLAS, and they
17 misrepresented to the Court.

18 Next.

19 Here's an e-mail from Barry Barnett to Camina. This
20 is all the way back in March of 2003. It says, "The bottom
21 line is that New Century continues to use the LoanForce
22 database and has postponed switching over to mLAS and RESPA
23 (a new database) until the second or third week of May.
24 It also appears that the developers of LoanTrack copied
25 parts of the LoanForce database in creating the LoanTrack

1 database."

2 Remember, this is the same Barry Barnett who wrote
3 you a letter saying that the people who created LoanTrack
4 had no access to LoanForce.

5 Next.

6 Here he is again later: "Vision Core got the LoanForce
7 tables, and early on. E-mails in fall of 02"--remember,
8 they only gave us versions of the software -- we talked
9 about this in the VSS portion. They only gave us versions
10 of the software for '03. Well, there's a reason why they
11 only gave us versions in '03, because e-mails indicate
12 that in the fall of '02, "... New Century is playing
13 games with the user-ids to evade increasing the number of
14 licenses...."--with--"References to LoanForce in the mLAS
15 code."

16 References to LoanForce in the mLAS code from their
17 expert. We never got anything from Dr. Pooch, no notes,
18 no documents, no e-mails, no reports, anything that
19 indicated he had even done this.

20 Next.

21 Then there's a letter from Camina to Norment on
22 11/21/03. Now, this is -- this is an interesting thing
23 because the client again is sending Camina documents to be
24 produced in the litigation, and Camina is looking at them
25 carefully, and there's a few documents she doesn't want

1 to produce or she wants to talk about them before they're
2 produced. So she writes this letter to Norment to talk
3 about these documents.

4 Go ahead.

5 One of these documents is called LoanForce Support
6 Plan, and it's dated February 5th, 2003. This is before
7 the termination of the license agreement and this is before
8 the litigation which was filed on actually February 6th --
9 I believe it was February 6th.

10 So here's VisionCore, Tony Dulkis and VisionCore,
11 talking about a LoanForce Support Plan where VisionCore
12 is going to have all access and basically take over--take
13 over--LoanForce, the entire operation of LoanForce while
14 they are still building mLAS.

15 This document was never produced in the litigation
16 obvious -- for obvious reasons. It tells everybody that
17 everything they told you and us and the arbitrator about
18 mLAS being a clean-room approach, the mLAS database being
19 a clean-room approach, were false.

20 One of the things that was actually asked for, again,
21 was the VisionCore contract, including all exhibits. This
22 was -- this was an issue because we took Tony Dulkis's
23 deposition and what he said in his deposition didn't seem
24 to jive with the contract -- the work that he was doing
25 didn't seem to fall within the purview of the contract with

1 VisionCore that they gave us, which was a later contract.

2 So we wanted to know -- we wanted all parts of the contract.

3 So even after she has the discussion about are we going
4 to produce this, it has to do with LoanForce, it's clearly
5 called for, it's been ordered produced, they don't produce
6 it. And even after we send them a letter saying, we want
7 all the VisionCore contract materials, they still don't
8 produce it.

9 Next.

10 And then there's an e-mail from Malovos: "I glanced
11 through the documents you attached to your letter dated
12 11/21 in which you state that you want to discuss these
13 documents before producing them."

14 So -- and, again, they are having a discussion, a deep,
15 intense discussion about whether to produce this LoanForce
16 Support Plan indicating mLAS had access while they were
17 working on the mLAS database -- whether VisionCore had
18 access while they were working on the mLAS database.

19 And Camina to Malovos, "I want to go through them and
20 figure out their significance. I suggest a quick phone
21 call when you get a chance." This is part and parcel
22 to her produce-it-if-it-helps-suppress-it-if-it-doesn't
23 attitude towards discovery. They have a discussion. I'm
24 sure the discussion went something like, this pretty much
25 proves that Tony Dulkis and VisionCore had access to

1 LoanForce while they were working on the mLAS database,
2 this goes into file 13, which is where it went.

3 Next.

4 There's also another document of the six in the
5 letter, a LoanForce Problems document, also a document
6 never produced.

7 Next.

8 After VisionCore was hired, they had a list of problems
9 that they needed to address. And this document actually is
10 also, I think, dated the 5th of February. And one of the
11 things that VisionCore is going to do is review existing
12 source code and add comments as necessary. The source
13 code they're reviewing is LoanForce database source code.

14 So, again, this is another document that proves that
15 while mLAS database was being worked on by VisionCore,
16 they had access to the LoanForce database.

17 Next.

18 And, again, here they talk about again the LoanForce
19 Support Plan, LoanForce Problem Docs, and there is more
20 discussions between Camina and Malovos about that.
21 Documents are ultimately not produced.

22 Now, this is the last thing I want to talk to you
23 about mLAS because I think it's -- and, again, this is
24 pretty important. The Court clarified on the 16th the
25 Protective Order, saying, I can't find you in contempt

1 because it wasn't clear enough, but let's make it clear
2 now. LoanForce is confidential material. Because it
3 was designated confidential material, it's confidential
4 material. So now you know that information is
5 confidential, not just documents exchanged and discovered.
6 So we're going to clarify that.

7 So now New Century, Susman Godfrey, you now know that
8 if it's designated confidential, no one can see it except
9 those allowed to see it under the Protective Order.

10 This caused an uproar at New Century.

11 Next.

12 Monika McCarthy, when this clarification comes down,
13 is in a panic because she knows that LoanForce code is in
14 mLAS. And she knows that if the Court has now decided that
15 LoanForce code is confidential, even if it was received
16 prior to the litigation, despite the fact that the use
17 of it violated the Preliminary Injunction, now we have
18 a Protective Order saying LoanForce code, as designated
19 confidential, cannot be seen by anybody other than people
20 allowed under the Protective Order.

21 So she, in a panic, e-mails Ophelia Camina and says,
22 "I would like a response from you as ... you have a better
23 understanding of the issues and testimony by our experts,
24 regarding New Century's continued use of Loan Trak 2 and
25 MLas, as a result of the judge's clarification," of the

1 Protective Order. "As you know, this would be a drastic
2 measure that would have significant impact on the Company,
3 so it is not a step that I wish to take unless it is
4 absolutely necessary. Also, what strategic steps can
5 we, or should we, take to ensure that we are doing the
6 right thing with regard to this latest clarification."

7 So she understands--and let's go to the next
8 one--because, remember, she's the one that says in an
9 earlier e-mail, "... some tables and fields were used from
10 LoanForce in LoanTrak 1 & 2, and MLas." So she knows that
11 your clarification of the Protective Order would require
12 the shutdown of mLAS.

13 The response that comes from Camina and Barnett
14 apparently is, don't worry about that clarification,
15 we're not shutting anything down, business as usual.

16 The next topic I want to talk about is the purge or
17 the nonpurge.

18 THE COURT: Just a matter of information, you're
19 right around 90 minutes.

20 MR. SHORE: Okay. I should make it with 15
21 minutes hopefully to spare for rebuttal.

22 So respondents misrepresented that New Century had
23 been purged of LoanForce to limit the scope of the Court's
24 Preliminary Injunction.

25 So what we have here in April of '03, there's an

1 e-mail from Barnett to Camina. The bottom line is New
2 Century continued to use the database. There appears to
3 be a serious problem "that may prompt Judge Godbey to
4 issue a preliminary injunction against further use of the
5 LoanForce database and of the LoanTrack database," and we
6 need to accelerate our changeover to mLAS and RESPA.

7 So it's clear from the very beginning -- and there's
8 notes that are in the record where that, from the very
9 earliest meetings, they admit to copying the -- the code
10 and misappropriating the code. But very early on, they
11 are very concerned about preliminary injunction.

12 So Barnett on April 21st writes the Court a letter,
13 which is now famous or infamous, saying, "New Century will
14 no later than April 25 ... under Dr. Pooch's supervision,
15 delete or return ... all the LoanForce software, including
16 application ... and database, that New Century has the
17 ability to access." We're going to take it all off
18 ourselves; you don't need to enjoin us.

19 Then, on 4/22, there's another letter from Barnett to
20 the Court, saying, "New Century responds, again, by assuring
21 the Court that New Century will delete from its servers all
22 database SQL scripts and codes, if any, that it believes
23 may be derived from LoanForce and are accessible to New
24 Century."

25 So he's reiterating, we're going to take care of this,

1 we're going to take everything off.

2 Then we have an April 24 declaration from Udo Pooch.

3 He says, "On April 22, I also supervised and observed"--he
4 personally observed--"the deletion of LoanForce, LoanTrack,
5 LTK Moon and LF Moon."

6 Now, we know that's not true. It wasn't true on the
7 24th when he wrote it and it certainly wasn't true on the
8 22nd.

9 So now we have the infamous lock-and-key declaration of
10 John Norment where John Norment says, everything has been
11 removed, we're not using it anymore, everything related to
12 LoanForce, the servers have been imaged and everything is
13 under lock and key in the Legal Department, and you don't
14 need to worry, Judge Godbey, about issuing a preliminary
15 injunction.

16 However, on the Nitrogen server in 2004 and on the
17 Nitrogen server on December 19th, 2003, John Norment finds
18 the LoanForce code.

19 Next.

20 In the interrogatory responses in the case, the
21 Nitrogen, Spider, Cheetah were called development/quality
22 assurance servers. So if Dr. Pooch went to New Century and
23 personally supervised the deletion of LoanForce from all
24 of the servers, how could he have missed a development and
25 quality assurance server like Nitrogen, a server that was

1 being used to develop software?

2 Now, on 8 -- August of '04, Barnett again tells the
3 Court, "I believed, and continue to believe, that the
4 deletion of LoanForce database versions as supervised by
5 Dr. Pooch removed any danger of imminent harm to PSS."
6 This is in his show cause declaration.

7 Now, this is after he knows that LoanForce has been
8 found on a development/quality assurance server, this is
9 after he knows that John Norment found a version subject
10 to the injunction, and we'll show you in a minute what else
11 he knew about Pooch's so-called purge.

12 Next file.

13 So what exactly did -- did Pooch do? Well, on 4/22nd,
14 he spent a grand total of five hours at New Century. And
15 he met with people from VisionCore during that time, he met
16 with people from eConduit, he met with people from New
17 Century.

18 So this is his only bill related to any design of a
19 purge, any implementation of a purge, and this is also, by
20 the way, shortly before he prepared his -- his summary, his
21 declaration for the preliminary injunction hearing. So all
22 the information he would have had to have gotten to create
23 his expert report for the preliminary injunction, he had to
24 do that in the same five hours.

25 So then let's look forward at who really did the purge.

1 Here is Barry Barnett copied on the e-mail from John Norment,
2 April 18, 2003, and John Norment talks about all the steps
3 being taken to change -- to -- to purge and prepare for the
4 removal of LoanForce. Who's doing it?

5 On April 18th, "Load data into mLAS using scripts. An
6 external expert, Dr. Pooch, will be on-site Tuesday ... and
7 will review all of the above ... and supervise the final
8 load of data...."

9 So Dr. Pooch didn't do any of these things. He came
10 back and reviewed what they did. And the only thing he
11 actually did was supervise the load of data. He didn't
12 purge anything.

13 And there's another e-mail that shows he didn't purge
14 anything. Here's an e-mail from Norment to McCarthy: "We
15 expect Dr. Pooch to arrive Tuesday to supervise the mLAS
16 load data (sic)."

17 And then the other technical issues, "The servers
18 containing the sql databases will be 'cleaned' beginning
19 today," not under Dr. Pooch's direct supervision. Dr. Pooch
20 didn't identify the servers. Dr. Pooch did not observe
21 their deletion. "Corporate IT will remove any traces of a
22 LoanForce-LoanTrack (sic) code."

23 So who was it -- when they came and told you, we had
24 this outside expert come, identify the servers that had the
25 code, and personally observe the deletion, who really did

1 it? Corporate IT at New Century.

2 Would the Court have trusted a representation different
3 than what they gave, that simply all they did was have Dr.
4 Pooch go and load data from -- from -- into mLAS, that the
5 real people who did this supposed purge wasn't an outside
6 expert but was the corporate IT department?

7 Let's go to the next.

8 Now, this is 4/29. Now, remember, 4/29 -- all this
9 purging was supposed to have occurred on 4/22, April 22nd,
10 a week before. "19 servers were imaged, all of which were
11 Retail IT servers. All Retail IT servers were imaged.
12 Total - 19." "The servers imaged that were not included
13 in the original list of 11 in my declaration were 8."

14 What's on those eight? Jaguar and Nitrogen. So even
15 if there had been a purge on the 22nd or the 21st, the
16 purge was of the 11 original servers. These extra eight
17 (indicating) were never looked at, never reviewed, and they
18 certainly were never purged. And we know that from this
19 e-mail from a week later.

20 Now, let's look at a diagram of the servers produced
21 in the litigation. Here's Nitrogen (indicating). Here's
22 Jaguar (indicating). Now, remember, they told us in
23 discovery responses that Nitrogen was a development
24 server and a quality assurance server. And they told you
25 repeatedly all of the retail production servers, the stuff

1 actually used in the production of loans, everything has
2 been erased from that. Actually they told you everything
3 had been erased from everything.

4 Where's Nitrogen? Nitrogen is listed as a production
5 server. So when John Norment found code in December of
6 2003, he found it on a production server.

7 Next.

8 And, again, another document produced during the
9 litigation, you had Jaguar and Nitrogen, production
10 database, production backup database, and a standby for
11 Jaguar. These were listed in the documents as production
12 databases. They were listed in interrogatory responses
13 as development or quality assurance databases.

14 And even today, in 2006: "I wanted to bring ... your
15 attention that I noticed today - I found some old LoanForce
16 files ... on a shared drive." When was the shared drive?
17 It was on a Retail IT server in 2006.

18 There was no purge. Corporate IT went and took it
19 off a few things, a few servers, left it on the critical
20 servers. Dr. Pooch came in, nodded his head, checked it
21 off because that's what he was paid to do.

22 The next topic I want to talk about quickly is -- is
23 Dr. Pooch in general. First of all, there's a duty to
24 produce expert materials, and New Century withheld multiple
25 expert materials from Pooch. And -- and this -- this list

1 here of these four is not all of them. These are the ones
2 that we found documented, but I believe there is certainly
3 more. And Barnett and Camina were certainly complicit.

4 Here is an e-mail from Kim Gardner to Barnett and
5 Camina: "Shore's original order on PSS's motion to
6 compel ... required us to produce all communications"--
7 communications--"to and from Pooch, but not any other
8 expert."

9 Well, they weren't required just to produce documents
10 they gave him. They were required to produce any
11 communications that took any tangible form, which would
12 have certainly included voicemail.

13 Pooch did a draft report. The draft report was sent
14 to Ophelia Camina. Ophelia Camina took the draft report,
15 forwarded it to Barry Barnett. Barry Barnett made comments
16 to the draft report and returned it to Ophelia Camina.
17 Ophelia Camina then presumably sent it to Dr. Pooch because
18 all of the comments that Mr. Barnett made to Pooch's report
19 ended up in Pooch's report.

20 We never got the draft report.

21 Let's go to the next slide.

22 "Q. The draft that you commented on, shouldn't that have
23 been disclosed in the litigation?

24 "A. Probably, yeah.

25 "Q. Do you know why it was not disclosed?

1 "A. I do not.

2 "Q. Who made the decision not to disclose it?

3 "A. I do not know. It was my responsibility, but I
4 don't know who made that decision."

5 All right. And then again here are a few of the
6 comments to the Pooch draft report that Barnett made and
7 sent back to Camina knowing that it had to be produced,
8 which of course it wasn't.

9 Also--this is important--Pooch did a comparison of
10 the mLAS DataWarehouse database to LoanForce and he found
11 tables and he highlighted portions of them that he found
12 similar to LoanForce. This is their expert witness finding
13 tables in mLAS that looked like LoanForce tables. He
14 prints them out, he highlights them, and he forwards them
15 to Ophelia Camina.

16 Ophelia then forwards them to the client in an e-mail,
17 but she certainly doesn't forward them to opposing counsel.
18 Opposing counsel doesn't get to cross-examine Pooch on his
19 highlighted similarities between mLAS and LoanForce which
20 Pooch then goes to the arbitration hearing and says there
21 are no similarities and he found none.

22 Next file.

23 "Q. But we never received in litigation highlighted
24 tables from mLAS as part of the Dr. Pooch or any other
25 piece of discovery. So is that just something that,

1 again, an honest mistake, didn't get produced?

2 "A. Yes."

3 The honest mistakes always seem to be honest mistakes
4 that deprive us of critical evidence and they all seem to
5 be honest mistakes consistent with the December 3rd e-mail
6 not to produce anything unless it's specifically asked for,
7 known about, and helpful to them.

8 Next.

9 "Q. Well, if it wasn't removed -- put it this way. It's
10 probably still in the Redweld; it was just never produced.
11 Right?

12 "A. I don't -- I don't know how to answer that. Probably
13 somewhere -- I don't know. I don't know what the situation
14 is."

15 That's the defense to not producing anything. Nobody
16 made the decision. Nobody knows. It's just -- gosh, it
17 just fell through the cracks, all the evidence that would
18 have helped -- been helpful to you, all the evidence that
19 would have helped prove your case, gosh, that's the evidence
20 that fell through the cracks.

21 We then go to the transcript of Udo Pooch's e-mail.
22 This is where Udo Pooch wants to take a look at some things
23 to see if he can compare them and help them out. But if he
24 looks at them and he does a comparison, he wants to make
25 sure that there's no trace of the source because the source

1 would be versions of the software that they haven't produced
2 that are earlier than the versions they have.

3 So we have here is he -- you know, they're trying to
4 find out how -- how do we have you do this work without the
5 other side figuring out that we're withholding this stuff?

6 So Pooch has a great idea and calls Ophelia and he
7 says, "Ophelia, this is Udo ... I was just thinking about
8 the backups that they have," they being New Century, the
9 historical backups that they were not restoring and
10 producing to us. "If you folks really want to do something
11 with that in terms of ... damage control, my suggestion is
12 to go and take each of the backups that they have, extract
13 from that backup the LoanForce and LoanTrack TIM tables
14 that were specified by the other side's expert"--that's in
15 J. Etchison's report--"copy those tables and store them into
16 a separate file and put the date on it, ok, so just store
17 them as miscellaneous or whatever you want to call them and
18 then just date them and do that for every historical backup
19 tape that they have and then once they've done that, copy
20 all that stuff or move all that stuff onto a CD and ship me
21 the CD and I'll analyze it. But that's what needs to be
22 done."

23 So if you want to make sure that the source of what
24 you send me is not ever known to the other side, instead of
25 just restoring the backup tapes, putting them on a disk and

1 sending them to me, which would show exactly where they came
2 from, when they were dated, what version it is, here's what
3 you do: Let's just do a little laundering. Let's just --
4 let's just completely hide and erase the ability to trace
5 this.

6 That e-mail -- that voicemail transcribed shows that
7 Dr. Pooch was actively engaged with the lawyers in fraud.
8 It shows that he was actively engaged in damage control and
9 hiding information from the opponent. That is the kind of
10 voicemail transcript that anyone would want to have to
11 literally destroy the credibility of an opposing expert.

12 Let's go to the next slide.

13 And, again, they knew they had a problem with
14 Dr. Pooch. "We do have a problem with the experts.
15 Apparently there are some e-mails -- hopefully a very
16 small number -- that we haven't yet produced, but need
17 to produce. The 'schema analysis' that Dr. Pooch reviewed
18 ... wasn't produced as far as I know. I don't know the
19 reason, but we are now fully aware of the problem and I
20 do know that we are now trying to gather these e-mails
21 to produce to the other side."

22 Again, they were aware of all these issues with Pooch.

23 Next.

24 This is all the way to just shortly before the
25 arbitration, "We still have the problem that we haven't

1 produced Udo's e-mails (including this one, including the
2 attachment)." From the date I think, although I can't say
3 for sure, that this is the e-mail transferring his draft
4 report which we never got because we never got the draft
5 report.

6 Next.

7 And, again, Pooch's comparison of LoanForce to
8 TeleTrend, this is all the way -- this is a week -- well,
9 ten days before the arbitration. "Has Pooch made any
10 progress on comparing the TeleTrend database with the
11 early November 2000 LoanForce database and the April '03
12 LoanForce database?"

13 Now, remember, the comparison -- the original
14 comparison we know about of the November 2000 LoanForce
15 database with the April '03 LoanForce database is one
16 John Norment made that they were saying, let's send this
17 to Pooch and have him make it, too.

18 I think this 11/2000 LoanForce database they're talking
19 about is the November 9, 2000 database that John Norment did
20 a -- found and did a comparison on, and Ophelia Camina in
21 four different e-mails said, let's send this to Pooch.

22 Now, they deny doing it. They say, we didn't send it
23 to Pooch. But this indicates that Pooch was being asked
24 to do the same analysis that Norment did to see if his
25 conclusions were the same.

1 "Has Pooch made any progress on figuring out when the
2 allegedly infringing fields were added?" "Pooch's last
3 report to me ... he was working on it but he should be
4 done by now." Again, we never received anything about
5 Pooch receiving the November 9, 2000 version or comparison
6 of that version to TeleTrend or to the April 2003 version.

7 Next.

8 Now this is what --

9 "Q. And other than Exhibits 1 through 4, have you set
10 forth in writing at any time any of the opinions that you
11 may have related to this case?

12 "A. No."

13 So here's Dr. Pooch saying, other than Exhibits 1
14 through 4 -- and Exhibits 1 through 4--next slide--were
15 his is declarations and his expert report on November 7.
16 So Dr. Pooch basically denies there's a draft expert
17 report, denies that he's done any other work on TeleTrend
18 comparisons, denies information that we know exists -- we
19 know at least the draft expert report exists. And when
20 Dr. Pooch gives that testimony that there's no other thing
21 in writing that he's ever expressed his opinions on, who
22 is sitting next to him? Three guesses, and I think you
23 only need one: Ophelia Camina.

24 The last thing I want to talk to you about, Your Honor,
25 very briefly is something called the Lemieux alternatives.

1 They filed a fraud case against Positive Software.

2 Now, I asked in the depositions, and you've seen the
3 depositions, who came up with the fraud case, whose idea
4 was that, who did the Rule 11 investigation? No one will
5 admit to being the source of the fraud claim.

6 Now, there's a reason for that. The fraud claim was
7 fraudulent. The Lemieux alternatives--next slide--the
8 Lemieux alternatives are dated 1/31/03 before the cut-off of
9 LoanForce, the goal "not to ... cease using ... LoanForce
10 application unless absolutely necessary such as in the
11 events: PSS does not renew by choice...."

12 It's clear that they were -- they knew on January 31st
13 that PSS may not renew and could cut off the software key.
14 And so they had two different alternative plans, a two-day
15 plan or a five-day plan. The two-day plan was if it was a
16 sudden cut-off, and a five-day plan was if they had more
17 time.

18 So ultimately they actually implemented the two-day
19 plan because they were only down for two days after the
20 software key was cut off.

21 So on January 31st, '03, Jeff Lemieux is planning for
22 the cut-off of LoanForce and has a two-day solution, which
23 ultimately, we now know, the two-day solution is the one
24 that they implemented.

25 Next.

1 However, in the arbitration, being questioned I
2 believe by Ophelia Camina, "What was your reaction when you
3 learned that LoanForce stopped working on February 6th?

4 "Shocked."

5 He wasn't shocked. A plan was in place. A two-day
6 plan to fix it was in place. This is the source of their
7 fraud claim. We had no reason to believe that this thing
8 was going to be turned off, we were caught completely by
9 surprise, when in fact they actually had a plan, a written
10 plan in place for exactly such event.

11 I'd like to reserve my last 15 minutes for rebuttal,
12 but, Your Honor, I think that this is an overwhelming case
13 of -- it's beyond normal misconduct, it's beyond fraud.
14 It is a case of attorneys who put the interests of their
15 client and their own personal interests above the truth.

16 THE COURT: All right. Your last 15 minutes are
17 only 10 minutes long.

18 MR. SHORE: Okay.

19 THE COURT: Let's go ahead and take about a
20 10-minute break now. I show 10:23. So we'll see you back
21 at 10:33.

22 (Brief recess taken.)

23 THE COURT: Be seated. Mr. Beck.

24 MR. BECK: May it please the Court, Your Honor,
25 with the Court's permission, what I'd like to do is to deal

1 with the show cause issues first and then my colleague,
2 Mr. Fogler, will deal with the motion for sanctions, if
3 that's agreeable with the Court.

4 THE COURT: Sure.

5 MR. BECK: And we will not use the fully allotted
6 hours. All these issues we think that have been raised this
7 morning have enjoined in our papers, and there's no sense
8 in us going back over exactly what we've said in our papers.
9 But there are a few things that I'd like to call to the
10 Court's attention with respect to the show cause.

11 In April of 2003, before entry of a Preliminary
12 Injunction, Mr. Barnett represented to this Court that New
13 Century had deleted all of the LoanForce software from its
14 active servers. I don't think there's any question about
15 that. And as I read the record based on that, it appeared
16 that the Court narrowed the scope of the injunction.

17 So we clearly have a situation where there was a
18 representation to the Court, and apparently the Court
19 acted on that representation.

20 I think the evidence is pretty clear that subsequently,
21 during discovery in the arbitration, New Century restored
22 the LoanForce software on some of its active servers. And
23 I think it's undisputed that Mr. Barnett failed to advise
24 the Court that that had been done. Again, I think that's
25 what the record clearly shows.

1 Another issue which I -- in reading the record, it
2 appears that the Court was concerned about was the fact
3 that a Protective Order was entered by the Court and, as
4 the Court knows, there was an identical Protective Order
5 entered by the arbitrator which really limited access to
6 information designated as confidential to New Century's
7 outside counsel and its inside counsel. It actually was
8 a two-way street. The same thing applied to Positive in
9 this case.

10 The evidence shows that one New Century employee, John
11 Norment, used New Century's copies of LoanForce software to
12 perform an analysis for litigation purposes. And I know
13 the Court was concerned about whether there was a violation
14 of this Court's Protective Order.

15 And then the third area, it appeared in looking at the
16 record, was this whole issue of the November 2000 script,
17 which you've already heard about it.

18 THE COURT: And you can skip number 2.

19 MR. BECK: All right. With respect to the
20 restoration of the LoanForce software, the evidence before
21 Your Honor, I would respectfully submit, shows that New
22 Century determined that it no longer was going to use
23 LoanForce or LoanTrack-1 software. It had almost completed
24 the development of LoanTrack-2 and really didn't think it
25 was necessary to use either LoanForce or LoanTrack-1.

1 So what happened was, according to the evidence, is
2 New Century decided to delete all LoanForce and LoanTrack-1
3 database software from its active servers as well as its
4 earlier disabled application software from its desktops.
5 It engaged, as the Court knows, Dr. Udo Pooch, a respected
6 computer expert from Texas A&M, to really supervise this
7 effort.

8 The deleted software was preserved for litigation
9 purposes. We didn't want to claim that somehow we had
10 destroyed evidence, and its access was restricted to, or
11 at least was supposed to be restricted, to New Century's
12 Legal department.

13 Now, our clients, under the evidence we believe it
14 shows, relied on Dr. Pooch and, frankly, our client to
15 accomplish this deletion and preservation.

16 THE COURT: When you say your client, you mean --

17 MR. BECK: New Century.

18 THE COURT: Okay.

19 MR. BECK: In other words, that our clients Mr.
20 Barnett and Ms. Camina relied on Dr. Pooch and New Century
21 to accomplish this deletion and preservation process. And,
22 understandably, they were assured that the process had been
23 successfully completed.

24 And so when Mr. Barnett wrote the Court in April of
25 2003 about the deletion, understandably, I would submit, he

1 believed his statements certainly at the time were true.

2 Now, when he wrote the Court saying that LoanForce
3 software had been deleted, he frankly did not consider
4 at the time that backup tapes might have to be restored
5 in order to respond to forthcoming, or what would be
6 anticipated to be forthcoming, discovery responses from
7 Positive in the case.

8 In hindsight maybe he should have anticipated that.
9 Maybe he should have told the Court that. The record is
10 clear he did not do so.

11 In the arbitration, Positive requested all information
12 from New Century backup tapes. We objected to that. And
13 when I say we objected, I'm talking about our clients
14 objected to that.

15 After objection, Positive limited its request for
16 restoration of the backup tapes to three dates: October 31,
17 2001; January 21, 2003; and, quote, as currently being
18 used. There is some issue in this case as to whether the
19 November 9, 2000 script version was ever requested, but
20 that's really kind of a side issue, if you will.

21 The important point from our perspective, and what
22 we believe the record conclusively shows, is that the
23 arbitrator and counsel for Positive were told that the
24 restoration was going to be done by New Century employees
25 and it was going to be done on New Century computers.

1 New Century restricted access to those computers. No
2 one, neither Positive nor the arbitrator, objected to this
3 process.

4 And because the arbitrator was really supervising all
5 the discovery in the case, our clients--Mr. Barnett and Ms.
6 Camina--did not really think it was necessary to advise the
7 Court that it was responding to the discovery request in
8 the way it was. In other words, that LoanForce software
9 had been restored and were on New Century computers.

10 That was a mistake. They should have done so. It's --
11 it's -- it's the Court's order that's the most important
12 thing. They should have gone back. Notwithstanding the
13 fact that the arbitrator was supervising all of this
14 discovery and they knew what was taking place and the
15 arbitrator knew was taking place, because a court order
16 was involved, our client should have gone back and advised
17 the Court, if for no other reason than let the Court know
18 what was happening and the Court could then say, well, no,
19 you can't do that, or, yes, you can. But they didn't do
20 that and that was a mistake.

21 But respondents, from their vantage point, were assured
22 by New Century that no one at New Century commercially used
23 LoanForce or LoanTrack-1 software after April 2003. We --
24 our clients believed them and we've seen no evidence to the
25 contrary before Your Honor.

1 Now, let me talk about New Century employee access to
2 LoanForce software. And this really gets into this issue
3 of whether or not our clients in good faith did or didn't
4 do anything.

5 THE COURT: And this time our clients means --

6 MR. BECK: Mr. Barnett and Ms. Camina. And our --
7 our clients, my firm's clients, believed in good faith that
8 the Court's Protective Order permitted New Century access
9 to information that was in New Century's possession at the
10 time when litigation began. They knew that commercial use
11 was prohibited under the Preliminary Injunction and, to
12 their knowledge, no commercial use was ever made of that
13 software.

14 I know the Court had a different view of the Protective
15 Order, and understandably so. But at least as far as --
16 as the evidence is concerned, we think that the record is
17 clear--and I don't mean this to be an excuse but really just
18 an explanation--that as far as our clients were concerned,
19 they believed that being able to use information that was
20 in your possession at the time the litigation began was
21 reasonable under normal protective orders.

22 And I understand that the Court thought otherwise.

23 THE COURT: Yeah. And the whole point of the
24 lawsuit was to keep you-all from using that information.

25 MR. BECK: I -- I --

1 THE COURT: That seems a weird construction of
2 the Order, but we've already been through all that.

3 MR. BECK: Yes, sir. And -- and I won't spend
4 any more time on that. I just wanted to make sure that
5 the Court was aware of exactly what our clients' position
6 was in the case.

7 Let me turn now to the November 2000 version of
8 LoanForce, and let me try to recite some key facts.

9 THE COURT: Let's -- before you do, let's back
10 up. And this is my fault. I don't know that I was ever
11 sufficiently clear with you-all about what I was troubled
12 by, and it wasn't restoring backups in order to comply with
13 requests for production in the arbitration. I understand
14 how that happened.

15 It was restoring it for Mr. Norment to use -- and
16 actually I don't know that that was a restoration, it was
17 just never purged. It was telling me, don't worry, it's
18 under lock and key in Legal, and then, come to find out,
19 your chief technology officer who is supposedly overseeing
20 the clean room development of the replacement product, had
21 ongoing access to it --

22 MR. BECK: Let me --

23 THE COURT: -- when I thought it was under lock
24 and key in Legal and possibly one of the very key persons
25 I would not want to have access to it, had access to it,

1 and the only reason that wasn't expressly prohibited in
2 the injunction is I had been assured that that wasn't a
3 problem --

4 MR. BECK: Yes.

5 THE COURT: -- and you don't need to worry about
6 it.

7 MR. BECK: Yes, sir. And I understand the Court's
8 concern. John Norment was clearly the chief technology
9 officer of New Century. He was assigned to help with
10 discovery in the litigation. Our clients, Ms. Camina and
11 Mr. Barnett, needed some help, some technical help to be
12 able to respond in discovery.

13 THE COURT: This wasn't responding to discovery.
14 The restoration to provide a copy to the plaintiffs I
15 understand. This was doing an independent analysis of
16 the software.

17 MR. BECK: Well, he -- he was never to have had
18 access to any confidential information produced by Positive
19 in this litigation or in the arbitration, for that matter.
20 He did compare for litigation purposes a version of
21 LoanForce as it existed on New Century servers as of
22 April 9, 2003. There are no question about that.

23 Our clients, Ms. Camina and -- and Mr. Barnett,
24 believed that it was permissible for him to -- to review
25 materials in our possession at the time. And we believe

1 that's what he in fact did.

2 Now, what he did was absolutely useless and wasn't
3 even used in the arbitration. But at least from what we
4 understand, they reasonably believed that what he was
5 in fact doing was using information that was already in
6 possession of our client, New Century--let me clarify
7 that--before the litigation began.

8 THE COURT: I had understood that, in part,
9 Mr. Barnett's response to the concern that I just
10 mentioned to you was he didn't know it was happening. He
11 just didn't know. And by the time he found out about the
12 Norment analysis, it became disclosed to the Court shortly
13 thereafter. Did I understand that correctly or not?

14 MR. BECK: No, I think that's exactly right.

15 THE COURT: Okay.

16 MR. BECK: I mean, this suddenly came out of the
17 blue. There's evidence in the record nobody asked him to
18 do this. It suddenly showed up out blue.

19 So there's no evidence, at least that I've seen in this
20 record, that suggests that either Mr. Barnett or Ms. Camina
21 said, John Norment, here's what we want you to do, and
22 somehow gave him information that arguably was protected
23 by the Court's Protective Order.

24 THE COURT: And separate and apart from the
25 Protective Order, I had been assured by Mr. Barnett that

1 it was not available to him.

2 MR. BECK: Well, it -- it should not have been
3 available to him. And -- and, again, Your Honor, I go back
4 to the point that we -- we believe what Mr. Norment was
5 using was information that was already in New Century's
6 possession at the time of the litigation. And so at least
7 under the construction of the Protective Order -- and we
8 know the Court has a different view --

9 THE COURT: Yeah.

10 MR. BECK: -- but we believed that was
11 permissible.

12 THE COURT: My issue with regard to the show cause
13 was not the Protective Order. It was the representation by
14 Mr. Barnett, don't worry, it's under lock and key at Legal,
15 and then find out, no, it's not.

16 MR. BECK: And -- and I think the short answer
17 is he believed that to be true, that was represented to
18 him to be true, and he relied upon that to be true.

19 If I may turn now to the November 2000 version of
20 LoanForce, and -- and this gets awfully confusing, Your
21 Honor, with all these versions floating around.

22 In August of 2004, as the Court knows, Positive claimed
23 that it lost the November 2000 script and that was why it
24 asked New Century for what it called the earliest version
25 of LoanForce. And their argument was that that wasn't

1 produced during the arbitration and somehow that skewed
2 the arbitration and that's why they lost and repeated that
3 allegation in the amicus brief they filed before Your Honor
4 in the show cause.

5 We initially responded, when we heard this in the show
6 cause, by saying we don't know why this wasn't produced.
7 We believed them when they said that it wasn't produced.
8 We said we don't know -- if it wasn't produced, we don't
9 know why it wasn't produced in the case. It should have
10 been produced.

11 But we also said that, contrary to what they now say
12 that this is somehow a -- a -- a riveting document, an
13 important document, a highly critical document, the fact
14 of the matter is it was totally unimportant in any event
15 because the reason that Positive lost the arbitration was
16 because they failed to compare the registered software side
17 by side with the accused software, which is what the Fifth
18 Circuit, as the Court knows in the Brigman (phon.) case,
19 says you have to do in the case.

20 Now, they -- their fallback argument is, well, if we'd
21 have had this, we'd have registered it. Well, the fact of
22 the matter is that they did have it and we now know that
23 they had it. But our position is that it --

24 THE COURT: But you didn't know that they had it
25 and they didn't know that they had it.

1 MR. BECK: Exactly. I mean, that -- that's
2 correct. We didn't know that they didn't have it until
3 this week when -- or I guess it was last week now, when --
4 when we find out that -- that they did in fact have it.

5 They say they didn't know they have it. I don't know
6 whether that's accurate or not. They initially said they
7 didn't have it. We now know that was incorrect. But the
8 point is, we believed them. And so our response initially
9 was that, you know, it should have been produced if you --
10 if you didn't get it.

11 But in the big picture it doesn't make a hill of
12 beans because in the big picture you lost for a totally
13 different reason. Whether that was a mistake on their
14 part, I don't know.

15 What Positive -- and the Court knows we asked them,
16 because of defenses we were pursuing, give us what you
17 initially gave us. And what they gave us was not the
18 November 9 version. They gave us the November 26th
19 version of LoanForce.

20 We had asked them to produce the original version of
21 LoanForce that they provided to us. And we understood
22 that what they gave us was the original version, the
23 November 26th version.

24 And -- and if -- if that was LoanForce as delivered
25 to New Century, the question is, why didn't they even

1 introduce that into evidence? If they didn't know, as
2 they are claiming, about the November 9, 2000 version and
3 they represented to us in discovery that the November 26th,
4 2000 version was really the original version, why didn't
5 they even introduce that into evidence in the arbitration?
6 It was marked as an exhibit. It was R-651. And they never
7 even introduced it into evidence.

8 Now, Positive had versions of LoanForce that predated
9 what they registered. And as the Court knows, they
10 registered the December 2002/January 2003 version. That's
11 what they chose to register. And they're now trying to have
12 this Court believe that, oh, no, we would have registered
13 a much earlier version, even though there were subsequent
14 iterations that hopefully improved on the software. That
15 makes no sense at all. And by registering that version,
16 they chose not to register any earlier version, including
17 the November 26th version.

18 In any event, Positive had -- we now know they had
19 the November 9, 2000 version all along. We produced it on
20 November 21, 2003. Significantly, Your Honor, they gave
21 the original version to their expert, a Professor Etchison.
22 Professor Etchison had it but was not asked to tell the
23 operator anything about it.

24 THE COURT: The November 9 or November 26?

25 MR. BECK: Well, if -- if you look at the

1 transcript, we believe it was the November 9, 2000 script
2 that she was talking about, because she was not only
3 questioned about that on cross-examination, even the
4 arbitrator asked her, now, wait a minute, when you say
5 the original version, what are you talking about?

6 And she got this from Mr. Mandel, at least the way I
7 construed the testimony. We've cited that to the Court
8 in one of our filings. Their own expert had a copy of
9 the November 9, 2000 version, and again they chose not to
10 use it. They -- again they chose not to even tell the
11 arbitrator about it.

12 And now they're trying to have you say that's the
13 centerpiece of why we lost this arbitration. That makes
14 absolutely no sense and is really rebutted by the record
15 itself.

16 So, Your Honor, our position is that with respect to
17 the November 2000 version of LoanForce, they had it, they
18 knew they had it, their expert had it, and they elected
19 not to use it top, side, or bottom.

20 Now, let me go back to --

21 THE COURT: In terms of the disciplinary
22 proceeding, I think the question more is, why didn't
23 Ms. Camina produce it as opposed to what use would they
24 have made of it and whether it would have altered the
25 outcome.

1 And I understand your answer to that is because of
2 the trial that she had in the other matter, she delegated
3 that to the other people on the trial team, and for
4 whatever reason they didn't do it. But as far as her,
5 she delegated that responsibility to other people to
6 handle and then went to trial in the other matter.

7 MR. BECK: Right. Judge, I wish there was a
8 better answer. I mean, the bottom line is that it fell
9 through the cracks just as was -- as was testified.

10 THE COURT: But that wasn't her fault. She
11 delegated that to other people --

12 MR. BECK: She delegated it. But -- but, you
13 know, ultimately our clients--and, again, I'm talking
14 about Mr. Barnett and Ms. Camina--I mean, they're -- they
15 are responsible. There's no question about it. I mean,
16 when you try a lawsuit, it's a team effort in the case.
17 Now, Mr. Barnett was senior, and he's -- he's accepted
18 responsibility for that.

19 But we get back to what was really happening here,
20 because when Ms. Camina found out about the -- the so-called
21 Norment version, what they call the Norment version, what
22 she told the Court in the declaration, she says, I didn't
23 even know what it was. And her exact words were, I thought
24 it odd that there would be a script several times larger and
25 two weeks earlier than a version that Positive sent to us in

1 response to discovery and said it was the original version.

2 So it raised questions in her mind about precisely what
3 it was. But clearly -- and you have seen the e-mails where
4 she said, all right, I'm going to trial, she delegated that
5 to somebody else, and it flat fell through the cracks. And
6 I don't -- you know, I wish there was a better answer for
7 that. We made a mistake. There's no question about it.

8 Now, under Local Rule 83.8(b), which Your Honor cited,
9 and I believe it's in the Court's September 28th, 2004
10 opinion, you made reference to a perceived violation of the
11 lawyer's duty of candor to the Court. And I assume you're
12 talking about Texas Rule of Professional Conduct 3.03.

13 That rule, as the Court well, knows, prohibits a lawyer
14 from knowingly making a false statement of material fact
15 to a tribunal. Knowingly means having actual knowledge
16 of the facts. And then there, of course, is the clear
17 and convincing evidence standard which applies here.

18 I would submit to Your Honor that neither Mr. Barnett
19 nor Ms. Camina knowingly represented -- misrepresented
20 facts to the Court.

21 THE COURT: But, just as a legal matter, I think
22 there's at least some authority that says if you unknowingly
23 make a false statement and then later come to find out it is
24 false, you have some duty to correct.

25 MR. BECK: I think you're correct, Your Honor.

1 I think you're correct on that.

2 But neither Mr. Barnett nor Ms. Camina knowingly
3 represented any fact to this Court -- when Mr. Barnett
4 told this Court that New Century had deleted the LoanForce
5 software from its active servers, he believed it. He
6 believed it at the time. That's what he was told by his
7 client. His client represented to him that that had
8 occurred.

9 And when there was a -- a restoration, as I said, he
10 should have told the Court that there was a restoration.
11 He didn't do so, as I said earlier, because the arbitrator
12 was supervising all of the discovery under an identical
13 Protective Order. But clearly, in hindsight, he should
14 have gone back to Your Honor, and I think he's acknowledged
15 that. I don't think there's any question about that at all.

16 But neither Mr. Barnett nor Ms. Camina intentionally
17 disobeyed either this Court's Protective Order or the
18 Preliminary Injunction. They believed that -- that
19 New Century employees were permitted to have access to
20 information in their possession at the time of suit as
21 long as it was not used for commercial purpose. And they
22 never knew whether anything was ever used for commercial
23 purposes, and to their knowledge, it was not.

24 Now, in conclusion, as this Court well knows, the
25 practice of law is not a science. It's an art. Lawyers

1 make judgments. Trial lawyers make judgments, but they
2 make judgments in the heat of battle.

3 The underlying case, as I have familiarized myself
4 with it, is probably the most contentious and heated
5 lawsuit or arbitration I have ever witnessed in my 35 years
6 of practice. I have never seen anything like that in my
7 life.

8 I have never seen a case where repeated motions for
9 contempt, repeated motions to strike pleading, repeated
10 motions for sanction -- we even had a motion for sanctions
11 filed against our firm in this case. Because they
12 complained they didn't want Susman & Godfrey responding
13 to their discovery requests, we said, fine, so we did it.

14 And then when they asked for a 30(b)(6) deposition, we
15 put up Mr. Fogler, much to his regret, and then they filed a
16 suit for sanctions -- filed a motion for sanctions against
17 him. But I've never seen such a heated case in my life.

18 And those -- that was the situation in a compressed
19 period of time when these kind of judgments were being made
20 by Mr. Barnett and Ms. Camina.

21 Lawyers make mistakes in exercising judgments. Good
22 lawyers make mistakes in exercising judgments. Good lawyers
23 with excellent reputations make mistakes. But that doesn't
24 mean, Your Honor, respectfully, that they are acting in bad
25 faith, that they are acting knowingly, or that they're not

1 being candid with the Court.

2 The affidavits that you have before you from respected
3 members of the Bar in this community attest to the -- to
4 the reputations and integrity of both Mr. Barnett and
5 Ms. Camina. Lawyers like Mr. Barnett and Ms. Camina don't
6 get those reputations by flaunting court orders, acting in
7 bad faith, or being less than candid with courts. That
8 just doesn't happen.

9 And during the years that they've practiced, they
10 have built and developed their reputations, which has been
11 attested to by other members of the Bar. They practice at
12 a very high ethical and professional level because it's the
13 right thing to do, not because of the enormous consequences
14 that flow when they don't.

15 Now, as Your Honor well knows, they (indicating) have
16 seen every privileged document that was developed during
17 our -- Mr. Barnett and Ms. Camina's representation of New
18 Century, documents which -- which were never meant to see
19 the light of day because they were privileged documents.
20 They've got all those documents. They've got all of our
21 work product documents.

22 Your Honor, I would respectfully submit that if -- if
23 we were allowed to go through most trial lawyers' files,
24 privileged files, work products files, and we were creative,
25 we could make some kind of an argument that somehow somebody

1 didn't honor a discovery response. Maybe right, maybe
2 wrong, but we could certainly make that kind of an argument.

3 And you can certainly use words like "perjury" and
4 "subornation of perjury" and "arrogance" and -- and words
5 like that, but that doesn't make them true.

6 And we respectfully submit that the evidence in this
7 case shows that Mr. Barnett and Ms. Camina made mistakes,
8 but they certainly did not act in bad faith or act knowingly
9 or want to violate a court order.

10 They have acknowledged the mistakes they've made,
11 they're embarrassed by them, they deeply regret what has
12 happened, and frankly they've already suffered enormous
13 consequences. But regardless of what you do now with
14 respect to this show cause, nothing can undo what has
15 already been done.

16 There's an opinion dated September 2004 that questions
17 their character, professionalism, and integrity. That's
18 on the books. That's not going to go away. There are
19 pleadings in this proceeding that are now made public.
20 That's not going to go away. And the articles that have
21 been printed in the Texas Lawyer and other kind of magazine,
22 that's not going to go away, either.

23 In conclusion, Your Honor, I'd simply say that -- that
24 these lawyers, these two lawyers, are good lawyers and
25 they've really suffered enough. And, respectfully, we

1 would ask that they not be disciplined any further.

2 Thank you, Your Honor.

3 MR. FOGLER: May it please the Court, I'd like to
4 pick up on a subject that Mr. Beck has initially discussed
5 because I believe it is one of the central issues in the
6 case, and that is the November 9, 2000 script.

7 As we have discussed in our prehearing brief that we
8 filed a few days ago, Your Honor, it turns out that we
9 found two significant pieces of evidence that disclose that
10 Positive had the original version of LoanForce all along.

11 There's been some discussion already, of course, about
12 the hard copy of the script that we produced on November 21,
13 2003. I want to come back to that because they've said in
14 their discussion this morning that it was clouded, hidden,
15 misrepresented. And we'll talk about that in just a minute.

16 But -- but there was no discussion by Mr. Shore about
17 the testimony, the -- the evidence that their own expert
18 was provided a copy of the original LoanForce database as
19 delivered to New Century.

20 She was asked -- Professor Etchison was asked on
21 cross-examination if she had made any study to determine
22 if the changes made in the LoanForce database as reflected
23 in your comparisons came from New Century or Positive.

24 Your Honor, this was a -- an important defensive issue
25 by New Century, not important to Positive, but we wanted

1 to prove, that is, New Century, wanted to prove in the
2 underlying arbitration that the improvements, the
3 modifications that had been made to the original version of
4 LoanForce, had been made by New Century, not by Positive,
5 and were therefore owned by New Century and not Positive.

6 Professor Etchison said, yes, she did make such a study.
7 She looked at the e-mail, she said, and then she was asked,
8 "Aside from looking at the e-mails, what else did you do?

9 She said, "I compared to see if it existed on the
10 original database of LoanForce."

11 The arbitrator listened to the cross-examination and
12 afterwards he had some questions for Professor Etchison.
13 He said, "A couple of times you used the term or you stated
14 that you compared something to the original LoanForce
15 database. What did you mean by the original LoanForce
16 database?"

17 She said, "I thought it was important to my analysis
18 to receive what Positive Software delivered to New Century.
19 And so I received a -- I asked Ed Mandel for a copy of what
20 exactly it was that he delivered to New Century. And that's
21 what I mean by that statement."

22 Arbitrator, "That thing that Mr. Mandel says he
23 delivered, what was the date on it, or if there is any
24 date information on it to give you a date?"

25 She says she doesn't recall.

1 What was clear as a result of the exchange that was
2 between Mr. Barnett and Professor Etchison and then the
3 arbitrator was that Mr. Mandel gave to Professor Etchison
4 what he called the original LoanForce database that was
5 delivered to New Century. She looked at it. She compared
6 it with later versions of LoanForce. She concluded that she
7 could not make any determination about who made the changes
8 in LoanForce, whether it was Positive or New Century. And
9 the subject was dropped.

10 Positive did not produce in the underlying arbitration
11 any transmittal or communication from Mr. Mandel or from
12 Positive to Professor Etchison that enclosed this original
13 LoanForce database, did not produce whatever analysis
14 she made. In fact, we know that Professor Etchison has
15 testified in her deposition that she had an entire stack of
16 materials containing her notes that she threw away after
17 she had finished her report.

18 So perhaps we'll never know what version of the
19 LoanForce database she got from Mr. Mandel. But what we do
20 know, Your Honor, is that Mandel has submitted a declaration
21 in the show cause proceeding in which he swears that the
22 November 26th script which was produced by Positive to New
23 Century is not any SQL code, is not LoanForce database, and
24 that's not what was the as -- original as-delivered version
25 of LoanForce. That's what Mr. Mandel says.

1 So what -- and we also know that because the version
2 that we produced on November 21st, the hard copy script,
3 was stamped highly confidential, he wasn't supposed to have
4 that. So he must have had some other original version. It
5 must have been another copy of this November 9, 2000 script.

6 The importance of this, Your Honor, is that we now know
7 that there was nothing that we did that caused any harm to
8 Positive Software. They had the original version of the
9 LoanForce database script.

10 They could have registered it if they had wanted to.
11 They chose not to. They gave it to an expert to review and
12 analyze and they could have had her discuss it and provide
13 her analysis, but they chose not to. They could have
14 offered it into evidence at the arbitration, but they
15 chose not to. Those were decisions they made.

16 But what we do know is that any failure by our side,
17 New Century or the Susman Godfrey lawyers, to produce an
18 electronic version of the November 9, 2000 software could
19 not have caused them any harm.

20 And, by the way, I'm showing counsel a copy of what
21 was produced on November 21st of 2003. Presumably it's in
22 the stack that Mr. Shore showed you. In fact, I'd like to
23 mark it as an exhibit and offer it into evidence.

24 MR. SHORE: No objection. We'd only ask that the
25 entire stack as it was produced, actually was produced, be

1 the exhibit.

2 THE COURT: If you want to offer that in your
3 rebuttal, that's fine.

4 MR. SHORE: No objection.

5 THE COURT: What is that marked as?

6 MR. FOGLER: We'll mark this as Respondent's
7 Exhibit 1.

8 THE COURT: Respondent's 1 is admitted.

9 MR. FOGLER: This proceeding has a number of
10 ironies. One of the ironies is that now the Susman Godfrey
11 lawyers are accused of allegedly knowing precisely what
12 John Norment discovered when he sent the electronic version
13 of this script on December 19 of 2003. They are supposed
14 to have known everything about it.

15 And yet the people who actually wrote LoanForce, who
16 were prosecuting the case, who claim that it had been copied
17 and infringed, they get 300-plus pages of script. Every
18 line, Your Honor--you may take a look--is dated November 9,
19 2000.

20 And there's no secret about the date. They say it was
21 clouded, it was hidden. We have letters from them saying,
22 we got these documents and we looked at them. They were
23 complaining about other things that weren't being produced
24 at the same time, and we're supposed to believe that they
25 did not know what their own code was.

1 What -- what this all means in terms of a motion for
2 sanctions, Your Honor, to the extent that there was anything
3 left of their claim that they deserve compensatory damages,
4 that is, what they should have recovered in the arbitration
5 but for the fact they didn't have this critical piece of
6 evidence, that's gone.

7 We now know they had it, could have used it, decided
8 not to, didn't help, and we know that they lost the
9 arbitration not because they didn't have this important
10 document but because they failed to make the proper proof.

11 The fact that they had this code also affects their
12 rather exorbitant claim for attorneys' fees, which I'll
13 talk about in just a little bit. Mr. Shore likes to talk
14 about a pattern on the Susman Godfrey's part. And there
15 is a pattern here, but it is Positive's pattern of accusing
16 us of not producing documents which they actually got.

17 I can tell you that, as the person who was responsible
18 for producing all of the privilege materials in this
19 proceeding, that it happened time and again that they
20 accused us of not producing things and us having to point
21 out the specific Bates numbers where the documents were
22 actually produced.

23 For example, we didn't get Dr. Pooch's time records
24 and his travel records so that we could prove that he wasn't
25 in New Century's offices except for April 22. So we write

1 him a letter and we say, no, here are the Bates numbers.

2 Well, you didn't produce anything that showed any
3 analysis of the five arbitrator candidates with Mr. Shurn.
4 So we tell him, here's the Bates number, here it is.

5 This kind of thing happens in contested litigation,
6 particularly where there's lots of documents, both hard
7 copy and electronic that are being produced. But perhaps
8 another example that we should talk about relates to this
9 VSS.

10 When you have a case that is as contentious as this one
11 was, there was an incredible amount of back and forth about
12 what the requests mean, what was being objected to, what
13 the arbitrator ruled, what was possible to do, what was
14 burdensome to do. There was back and forth in terms of
15 letters, phone calls, hearings in front of the arbitrator
16 on a continual basis.

17 With respect to the VSS, you're not going to find
18 any specific request from Positive that says we want
19 Virtual (sic) SourceSafe databases or even Virtual (sic)
20 SourceSafe's logs.

21 Your Honor, I have to make a confession. I am not a
22 software expert. I don't know very much about this stuff.
23 I have been told, however, that when they requested the
24 software code vaulting, that they wanted the software like
25 VSS that a developer would use to log changes made in the

1 development of the software. That's what I've been told.
2 I hope it's right.

3 We objected. We, meaning New Century and the Susman
4 Godfrey lawyers, objected to that request. The arbitrator
5 sustained the objection to that request. Nevertheless,
6 ironically, it's in this stack because on November 21, as
7 part of the production that New Century made to Positive,
8 they included the complete VSS logs as they existed at
9 that point in time for LoanTrack-1, LoanTrack-2, and mLAS.

10 Now, it's interesting that the way this comes up--Mr.
11 Shore mentioned this in his presentation--New Century was
12 not the developer of LoanForce, so New Century did not
13 have a VSS database or any VSS logs for LoanForce. So
14 when we're trying -- there's an occasional merging of
15 theories and ideas in some of Positive's presentations
16 as if the VSS log would have helped them determine the
17 earliest version of LoanForce. That's not correct.

18 They were apparently seeking different versions of
19 mLAS, LoanTrack-2, and LoanTrack-1. And as you saw from
20 the e-mail that was shown on the screen from John Norment on
21 December 10 of 2003, he tells Ms. Camina, we have already
22 produced the following versions of those programs to
23 Positive. They have them.

24 They had the ability to make comparisons between the
25 LoanForce software that they registered and those production

1 versions of mLAS, LoanTrack-2, and LoanTrack-1. That's
2 what they were supposed to do if they wanted to prove
3 copying or infringement. They just failed to do that.

4 But this example of the production of the VSS logs
5 is just another example of the way Positive shoots first
6 and asks questions later. Maybe they didn't realize that
7 the VSS logs were in this stack of November 21st, 2003
8 documents either. I find that difficult to believe. But
9 they are there. They got them.

10 If they wanted to follow up on them, believe me,
11 there are innumerable letters from Positive during
12 that time period following up on document productions,
13 complaining about their insufficiency, asking for additional
14 information, asking for a clarification. But there are no
15 documents, no requests, no follow-ups saying, we got these
16 documents but we want more, about the VSS.

17 This type of pattern of making accusations first and
18 then trying to weave the proof creating historical fiction
19 to try to supply the proof raises an important point. It
20 would be inappropriate to sanction Mr. Barnett or Ms. Camina
21 or the law firm of Susman Godfrey merely because Positive
22 makes an allegation of wrongdoing.

23 They have a burden of proof. It's not merely
24 supposition; it's not inference. They have to provide
25 clear and convincing evidence of bad faith. That's their

1 burden.

2 And there's a reason why the bar is set so high in a
3 sanctions proceeding, or for that matter a disciplinary
4 proceeding like the show cause. The reason is that we
5 are talking about what is -- what it means to be a lawyer,
6 what is at the heart of being a lawyer.

7 The Court's power -- to use an overused word in
8 today's environment, the Court's power is awesome. The
9 Court has the power to affect, perhaps even destroy, a
10 lawyer's reputation. It's a power to be used sparingly
11 and cautiously. That's why the bar is set so high.

12 So with that in mind, let's look at some of the other
13 charges that have been leveled. I was going to talk about
14 the -- the allegation that Ms. Camina lied about knowing
15 Mr. Shurn. We didn't hear anything about that. Maybe
16 that's something that's not all that important anymore.
17 But I do think it -- because it's something that they
18 spent a great deal of time on in their earlier papers,
19 that it's an example of how they have completely failed to
20 meet their burden. So let me just briefly discuss this.

21 Of course -- and -- and, by the way, I mean, this is
22 not an allegation where Positive suffered any harm here.
23 This is where they are in their prosecutorial position
24 concerned about Ms. Camina's candor to the Court.

25 Here are the facts. She believed, when Mr. Shurn's

1 name showed up as a candidate to be the arbitrator, that
2 she knew him from a prior case. She told the client that
3 she believed she knew Mr. Shurn.

4 At that point she had no duty to tell Positive
5 Software that she knew Mr. Shurn. She had no duty to the
6 Court at that point, either, with respect to the arbitrator
7 candidates.

8 But the important fact here is that New Century, as a
9 result of the information that was provided about the five
10 candidates, ranked Mr. Shurn third. It was Positive's
11 ranking of Mr. Shurn as first that caused him to be chosen.

12 Later, of course, Ms. Camina watched a videotape of
13 Peter Shurn giving a CLE presentation. She discovered at
14 that point that's not the person she thought she knew. She
15 didn't have any obligation at that point to tell Positive
16 about that, either.

17 After the award, of course, we know that Positive
18 accused Mr. Shurn of failing to disclose his prior
19 association with Susman Godfrey. Ms. Camina submitted a
20 declaration in response to that allegation that she did
21 not know Mr. Shurn previously and had not worked with him.

22 Where is the evidence that her declaration was
23 incorrect? Maybe more to the point, where is the clear
24 and convincing evidence that what Ms. Camina said was
25 deliberately incorrect?

1 There are many examples of Positive taking documents
2 out of context and inferring conclusions from them that are
3 unsupported by the language of the documents themselves.

4 Let's talk as an example about the documents that are
5 related to New Century's fraud claim against Positive.

6 To refresh the Court's memory, New Century claimed in
7 the arbitration that Positive in a January 28, 2003 phone
8 call had misled New Century into believing that it would
9 renew the software license for LoanForce. But, instead, a
10 week later Positive turned off the key and filed a lawsuit.

11 New Century claimed that was fraud. The arbitrator
12 agreed it was fraud. That issue has been determined to be
13 fraud.

14 Now we are told, however, that there are a couple of
15 documents which purportedly contradict that conclusion:
16 the so-called LoanForce support plan and the Lemieux
17 alternatives. We certainly invite the Court to read those
18 documents. They are a couple of pages long. They're not
19 very lengthy; they're very cryptic.

20 There is absolutely no indication in either of
21 those documents which could constitute an admission or a
22 confession that New Century knew Positive was going to
23 turn off the software key and sue them. In fact, it's the
24 opposite. They are trying to come up with alternatives to
25 deal with any scenario.

1 This claim, by the way, like many of the other
2 arguments that they make, is one that is barred by the
3 actual findings of the arbitrator. I couldn't help but
4 think, as we're listening to Mr. Shore's presentation, that
5 this was almost like an appeal of the arbitrator's rulings
6 on discovery and his rulings on the merits.

7 They're unhappy. I understand that. But, for example,
8 when they talk about the argument that mLAS was not actually
9 designed in a clean room environment and used pieces of
10 LoanForce or copied pieces of LoanForce or stole, whatever
11 word you want to use, those are the precise arguments, Your
12 Honor, that they made to the arbitrator. That was a central
13 issue in the arbitration. Did mLAS contain LoanForce? Did
14 it copy LoanForce?

15 THE COURT: The arbitration award was never
16 confirmed. In fact, I think but for the bankruptcy and
17 the settlement, there was at least still before the Court
18 a serious question as to whether it should be vacated on
19 other grounds, some of which are related to the subject
20 matter of this proceeding.

21 In that circumstance, how is the arbitrator's finding
22 possibly binding on me?

23 MR. FOGLER: It is still a final award, Your
24 Honor. Whether it has been -- it will never be confirmed or
25 vacated now because the parties settled, that is, Positive

1 and New Century settled. But it is still a binding final
2 decision by the decision maker chosen by the parties.

3 THE COURT: Binding in what sense? It was never
4 merged into a judgment, it was never confirmed, and it was
5 under active attack at the time the case was settled.

6 MR. FOGLER: I -- I believe, Your Honor, that
7 there is case law that an arbitrator's award, whether
8 confirmed or not, is binding on the parties because that's
9 what they contractually agreed to in their agreement. They
10 agreed that the decision of the arbitrator would be binding.
11 And I believe that it has that effect, whether it is
12 actually confirmed or not.

13 But my point is that these are the same arguments that
14 they have already made or heard and have been rejected.

15 Please don't misunderstand me, Your Honor. Our conduct
16 here was not perfect. As Mr. Beck has already indicated,
17 we made mistakes. There are several items that have been
18 identified now as a result of all of the production that we
19 have made that were not produced.

20 We can start by the -- by talking about the electronic
21 version of the November 9 script. We can debate all we
22 want about whether it had been specifically requested.
23 We've made some points in our initial declarations to
24 the Court about that. And, of course, now we know that
25 a hard copy, and I believe it to be an exact hard copy,

1 a line-for-line duplicate, of the electronic version.

2 THE COURT: Out of curiosity, have you checked?

3 MR. FOGLER: I have not, but I sent it to a
4 software person who would have the ability to do that.
5 So I was satisfied that it was the same.

6 THE COURT: Okay.

7 MR. FOGLER: And we haven't heard differently here
8 from Positive, either, so I think they have checked -- they
9 must have checked it and believed that it's the same.

10 THE COURT: I thought I heard a suggestion from
11 Mr. Shore that it might be different.

12 MR. FOGLER: I -- I cannot personally vouch for
13 it. I wouldn't know one line of script from another. It
14 wouldn't make any difference for me to look at it.

15 THE COURT: Uh-huh. But someone you rely on has
16 verified that for you.

17 MR. FOGLER: Yes.

18 THE COURT: Okay.

19 MR. FOGLER: I will tell you that Mr. Barnett
20 and Ms. Camina were examined at great length in their
21 depositions about this. They both said they regretted that
22 it had not been produced. They wished that it had been
23 produced because it was not, as it turns out, important to
24 the case and it would have avoided much of the controversy
25 that we now face.

1 I do want to make one aside here because it -- it --
2 before I talk about some of these other documents that
3 weren't produced. We have heard for quite a while, Your
4 Honor, that this November 9, 2000 script was found by
5 Mr. Norment on the Nitrogen server which was some kind
6 of active development server or now perhaps a production
7 server.

8 Mr. Barnett and Ms. Camina scratched their heads over
9 that allegation. They testified in their deposition that
10 they weren't personally aware of where this script was found
11 by Mr. Norment. He never told us. And we had stated in our
12 pleadings that we're not sure where it was found. And for
13 all we know, it could have been found on a backup that had
14 been restored.

15 So we were curious when we heard Mr. Shore in his
16 opening this morning professing to have proof that it was
17 found on the Nitrogen server and he even provided the Court
18 with a copy of some directory from the hard drive that
19 purportedly shows that it was found on the Nitrogen server.

20 Again, with some apologies for my ignorance, I looked
21 at this tab. Look at tab 23 in their presentation. And I
22 see that there are two files from the Nitrogen server that
23 are one kilobyte that are not the full LoanForce database
24 script. They are not -- don't appear to me to be SQL files.
25 And so I'm still wondering, where is the proof that this

1 was still on an active server at the time that Mr. Norment
2 found it? It's not there.

3 We don't know, Your Honor, even to this day, whether
4 the purge was perfect or not. What we do know is that
5 Mr. Barnett and Ms. Camina, like all lawyers who deal
6 with situations just like this, were entitled to rely on
7 representations from their client and from their expert
8 who say they performed the purge.

9 When Dr. Pooch submitted his declaration to the Court
10 in April of 2003 and he said, in my opinion New Century has
11 been satisfactorily cleansed of LoanForce, they had every
12 reason to believe it.

13 When Mr. Norment sent this November 9 script, by the
14 way, in December of 2003 to Ms. Camina, as we've tried to
15 do in our papers, you must place it in the context of what
16 Ms. Camina had been told by Positive before December 19,
17 2003.

18 There had been much discussion, much teeth gnashing and
19 back and forth about New Century's request to Positive
20 to produce the as-provided portion of LoanForce. Positive
21 objected. New Century filed a motion to compel. Positive
22 filed a response ultimately saying, we will produce the
23 as-provided version to you, and they delivered a CD-K--that
24 was how it was labeled, CD-K--that contained this November 26
25 script.

1 In my view it is perfectly reasonable for a lawyer to
2 rely on the representations of opposing parties that what is
3 being produced is what is -- what is what they represent it
4 to be. When they say that this is in response to your
5 request for LoanForce as-provided, they believed it.

6 So when Mr. Norment sends another script that's bigger,
7 earlier, different than what they had, of course it raised
8 questions in their mind about what it was. Could it be
9 TeleTrend? Could it be something different?

10 Ms. Camina urged her team to consider that and to send
11 it to Dr. Pooch so that he could review it. Obviously it
12 would be produced at that point.

13 When she went to trial, Mr. Barnett asked, has this
14 been produced? He couldn't open it. He didn't know what
15 it was. But in the heat of all of the other things that
16 were going on at that time in January of 2004, the ball was
17 dropped and it didn't get produced. It should have, we
18 regret that it wasn't, but it didn't have any impact on
19 the case.

20 They also complain about a number of items that
21 Dr. Pooch had that were not produced. Let's talk about
22 those quickly.

23 There was a draft report that Dr. Pooch prepared.
24 They have it now. They haven't shown you that draft
25 compared with the final version because it is so similar,

1 the changes were so cosmetic and unimportant, that their
2 lack of that particular document could not have caused
3 them any harm.

4 But, nevertheless, it was a mistake. It should have
5 been produced. There's no question that Dr. Pooch's draft
6 report should have been produced.

7 It is not an excuse, Judge, and we're not making it
8 as an excuse that Professor Etchison, their expert, didn't
9 produce any drafts or that she destroyed all of her papers.
10 But I use that as an example, though, to show that how, in
11 the heat of this contentious litigation fight, mistakes
12 occur.

13 There was a voicemail from Dr. Pooch. It was
14 transcribed. It was placed not in Dr. Pooch's expert
15 witness file where it would have been found and produced
16 but was somewhere else. It was on the I-Manage document
17 management system that -- that we produced among the
18 papers that we had. It, too, should have been produced.
19 We're not offering any excuse. It should have been
20 produced, but it wasn't.

21 But what we see with respect to this voicemail is
22 another example of taking the words that are on the paper
23 and weaving a story that is completely and totally
24 unsupported by the facts. It's just complete fiction,
25 Judge.

1 It is quite obvious what is going on with this
2 voicemail because they have later e-mails from Ms. Camina
3 attaching the transcript in which she tells her client,
4 here's what we need to do to try to prove who was the
5 author of changes made in the LoanForce database, we need
6 to go to the backup tapes, try to restore these particular
7 tables, and let Dr. Pooch compare them.

8 Now, that wasn't ever done, but there's no obfuscation,
9 there's no fraud, there's no tampering with evidence. I
10 don't know where they get these things. There is no way
11 that you can look at the information that is included
12 in the record and find that the failure to produce this
13 voicemail message was some part of a huge fraud on
14 Positive Software.

15 The last example that they gave was an e-mail from
16 Ms. Camina that attaches some mLAS code highlighted by
17 Dr. Pooch in which he found, quote, some similarity to
18 LoanForce on those -- on those two tables. That should
19 have been produced. Again, a mistake.

20 It's obvious, though, that it was Ms. Camina's intent
21 that it should be produced. If you look in the upper
22 right-hand corner of the document in her own hand, she has
23 written, "To Dr. Pooch's file." If it had been handled
24 properly, as it should have customarily been handled, it
25 would have been placed in Dr. Pooch's file. When it came

1 time to produce his file, it would have been there and it
2 would have been produced at that point.

3 I can't tell you why it got misplaced. That kind of
4 thing happens. It's regrettable. But as Mr. Beck says, I
5 daresay that in any case, particularly one with as many
6 documents, as compressed and as contentious as this one
7 was, you would be able to find a slip in every case.

8 Positive has requested that the Court award attorneys'
9 fees as a sanction in this -- in this matter. We believe,
10 Your Honor, because there was no sanctionable conduct, no
11 fraud, no bad faith, there should be no sanctions awarded
12 at all and therefore no attorneys' fees.

13 If the Court believes, however, that attorneys' fees
14 are an appropriate sanction, we would like to have the
15 opportunity to present some further information to the
16 Court for the Court's consideration. But let me just say
17 a few words about it.

18 There are innumerable problems with Positive's proof
19 on attorneys' fees. The main one is that Positive seeks
20 apparently to recover all of its attorneys' fees from the
21 beginning of the lawsuit in January of 2003 to the present.
22 It is Positive's burden to demonstrate the fees which it
23 incurred as a result of the alleged misconduct. They did
24 not do that. For that reason alone, their proof fails
25 completely.

1 Positive has made innumerable allegations in this case
2 that have not proven to be true. Positive has made no
3 effort to segregate the fees that it incurred in making
4 its unsuccessful, untrue, unsubstantiated claims as it
5 has on any claims which the Court may be concerned about.

6 Positive has even asked for fees incurred in acting
7 as the Court's amicus in the show cause when they were a
8 volunteer. There is no legal authority upon which Positive
9 could obtain recovery of their fees for acting in that
10 capacity.

11 Even if you get beyond all of these problems in the
12 method in which they have sought their fees, their proof
13 itself is inadequate and unreliable. Out of the more than
14 a dozen lawyers who worked on this file, Your Honor, only
15 one kept any time records. The rest, all we have are
16 guesstimates.

17 We don't even have any real analysis by those lawyers
18 of how they made their guesstimate of the time that they
19 spent from the beginning of the case to the end. What we
20 are told in their declarations is, I looked at the docket
21 sheet, some of the file, and this seemed like the right
22 number to me. There are dozens of attorneys' fee cases
23 rejecting that very type of proof as adequate.

24 I might even tell you that the proof is internally
25 inconsistent. They have attached to the declaration of

1 their attorneys' fee expert the testimony of the expert
2 that they used in the arbitration, a lawyer named Carl
3 Roth, who did a similar estimate, survey of the lawyers
4 who worked on the arbitration through January of 2004.

5 His handwritten estimate is part of the file that was
6 attached to Mr. Bragalone's declaration, and he says that
7 they had spent 7,950 hours prosecuting their claims through
8 the arbitration. One answer, of course, to their request
9 to recover those fees through the arbitration is, again,
10 that they sought their fees in the arbitration proceeding
11 and they lost.

12 But if you look now at the proof that they submit to
13 this Court in support of their claim for attorneys' fees,
14 the number of hours that they have estimated for this 2003
15 case from the beginning to now is less than the 7,950 hours
16 that Mr. Roth put in his testimony as having been spent
17 prior to January of 2004.

18 It's those kinds of discrepancies that are created
19 when there is no corroboration, no backup, no support
20 for the request for fees.

21 We'd like to give the Court some of its time back.
22 And if the Court has questions about any of the other
23 allegations that Positive has made that we've addressed
24 in our pleadings, I'd be happy to answer them. Otherwise,
25 I thank the Court for your patience and turn it over now

1 to Mr. Shore.

2 THE COURT: All right. Ten minutes.

3 MR. SHORE: Your Honor, may I have a two-minute
4 warning?

5 THE COURT: Sure.

6 MR. SHORE: First of all, the other grounds of
7 sanctions in our papers are not abandoned. We simply
8 didn't have time to produce them -- present them today.

9 A couple of points. Norment found his November 9, 2000
10 version, quote, it was found in a directory on a server we
11 had not previously reviewed, closed quote.

12 The only Retail IT servers that were not reviewed were
13 the eight listed in the e-mail, including the Nitrogen and
14 Jaguar servers. The Court has the directory of the hard
15 drive and can look itself at the LoanForce SQL, see the
16 file name, it's on the Nitrogen server.

17 The reason specific dates for a backup restoration were
18 even discussed as opposed to all programs and all versions
19 was because Ophelia Camina and Barry Barnett repeatedly and
20 falsely stated that no earlier versions existed even though
21 the VSS database had every single version of the program.

22 The following facts are absolutely undisputed:

23 LoanForce existed on a New Century server that, quote,
24 had not been previously reviewed, closed quote, one of
25 those eight servers listed by John Norment's e-mail, and

1 it existed there after the entry of the Preliminary
2 Injunction. Undisputed.

3 And it existed there after the Court was told that
4 a complete purge had occurred. It's undisputed that
5 Mr. Barnett and Ms. Camina knew this, they kept it a
6 secret, they did not inform the Court in violation of
7 Preliminary Injunction. They did not inform the Court
8 that the purge never occurred.

9 In the prima facie brief at pages 33 through 34,
10 docket number 556, it's clear that Ophelia Camina actually
11 ordered John Norment to do the analysis. There are multiple
12 e-mails between Ophelia Camina and the client where their
13 client is instructing her to -- in the letter to the Court,
14 instructing Mr. Barnett to make sure the Court understands
15 that it was ordered by outside counsel, not done by John
16 Norment on his own.

17 Barnett undisputedly did know about the Norment
18 comparison of the 11/09/2000 version of LoanForce to the
19 April '03 version of LoanForce, and he did not disclose it
20 when he had the opportunity to do so in January of 2004.
21 He knew that there's two Norment analyses, one on the
22 spreadsheet and the other in the e-mail. He knew about
23 the one in the e-mail, he got a copy of it, he knew what
24 was being compared, and he never told the Court about it.

25 Positive Software did not know that an earlier version

1 of the software had been produced on paper because Ophelia
2 Camina and Barry Barnett repeatedly represented, both to
3 Positive Software's counsel and to the arbitrator, that
4 the 11/21/03 production was the code currently being used.
5 That's what they said it was to the arbitrator, that's
6 what they said it was to us, at the same time they were
7 saying there were no earlier versions.

8 The 11/26/2000 version was not registered, Your Honor,
9 not because -- and this is the version that -- that -- it
10 was simply a Prospect table. This is the 11/26/2000 version
11 that they claim was the version we already had. It wasn't
12 registered for two reasons: One, it was not complete; and,
13 two, we had no way to prove that we had ever given it to
14 New Century Mortgage.

15 It actually was called the AnyLoan Company SQL.
16 There was no proof ever in the case that it was given to
17 New Century Mortgage. It was simply the earliest table
18 that we still had, and that was produced in response to a
19 request for anything related to LoanForce code that had
20 been provided to New Century.

21 It went with also the -- and there's an explanation of
22 what R-651 is. Mr. Mandel has explained it. It's quite
23 clear.

24 Let me talk about the Judy Etchison, what he put up on
25 the screen. And I find this just amazing, Your Honor. You

1 can read -- you have in -- in your possession Ms. Etchison's
2 entire arbitration testimony. She's the one who used the
3 word "original." That's how she described the original
4 version copyrighted. That is so clear from her testimony
5 when you take -- when you read the testimony. She was
6 talking about the originally copyrighted version.

7 And as a matter of fact, Etchison testified on
8 December 19th, declared on December 26th, and testified
9 in the arbitration that the version she had, the one she
10 was calling the original version, was the same as the
11 copyrighted version.

12 The operative fact, Etchison filed a supplemental
13 report in August of '08 comparing the November 9, 2000
14 version to the registered version and they are the same.
15 Now, we had no way of proving that to the arbitrator that
16 they were the same because they didn't give us the 11/09
17 version.

18 All right. They talked about in the VSS logs being
19 produced in this stack (indicating). The VSS logs are not
20 the VSS database. The VSS database for LoanTrack-2 and
21 mLAS could have been restored, could have been produced.
22 Camina and Barnett said don't.

23 The only versions of mLAS and LoanTrack-2 that they
24 produced were versions created in 2003. They did not
25 produce the earliest versions. You need the early versions

1 to prove derivation, because when you're proving derivation
2 from LoanForce, you have to show the earlier versions are
3 closer to LoanForce and then multiple additional versions
4 take place to where ultimately they don't look as much like
5 LoanForce when you get all the way to 2003.

6 And you saw the e-mail where they actually talked
7 about there were still a couple of tables in LoanTrack-2
8 that looked like LoanForce, but they would take care of
9 that in the next release. So they knew what they were
10 doing by not giving the earlier versions that could have
11 been restored from the VSS database.

12 As to why didn't we prove mLAS, you know, in the
13 arbitration was the same. Well, you know, that -- that's
14 very interesting. We didn't have the documents showing the
15 taint and that they had misrepresented all of the access
16 to LoanForce until the attorney/client privilege had been
17 waived and the bankruptcy case had been done. We didn't
18 have that material.

19 They testified -- in fact, Dr. Pooch testified that
20 mLAS had -- he didn't see any -- any similarities between
21 mLAS and LoanForce. Of course, if we had had the document
22 where Dr. Pooch actually did note the similarities, the
23 cross-examination may have been a little bit more effective.

24 As to Etchison and her notes--and I think that's
25 interesting that they would bring that up--Etchison had

1 never before served as an expert. Ever. When she was asked
2 in a deposition, are there any other documents that have
3 ever been created that ever contained any of your opinions,
4 she didn't do what Dr. Pooch did and lie, she told the
5 truth, which is why she got cross-examined on it, which
6 why they knew about it and cross-examined her at the
7 arbitration proceeding on the fact that some of her early
8 notes she had discarded. Because she told the truth.

9 So I think it's very interesting that Judy Etchison,
10 who had never been an expert before in her life, tells the
11 truth to the same question Dr. Pooch is asked when he lied,
12 and they are now criticizing us for having an expert to
13 tell the truth and give them the opportunity to cross-
14 examine her on her mistake.

15 As to the fee burden, first of all, this misconduct
16 started from the very beginning. And as you saw in our
17 presentation, the documents where this conspiracy started,
18 it started in March of 2003 and, frankly, it went on until
19 today.

20 The cover-up documents I think, which they didn't
21 address, they didn't address at all the fact that constantly
22 they were being reminded, the attorneys knew that mLAS was
23 tainted, they knew it was tainted and there was a plan to
24 keep it out of the injunction. And even when they found
25 out it was tainted, even when they found out that the

1 programmers of mLAS were actually the database
2 administrators for LoanForce, they never came back and
3 told the Court and they never told us. That is active
4 participation in a fraud or a cover-up.

5 The laws of our profession are built upon an assumption
6 of integrity.

7 THE COURT: Two minutes.

8 MR. SHORE: That assumption is confirmed when a
9 lawyer tells a client, no, I will not tolerate deceit or
10 engage in its practice. Conversely, when a lawyer engages
11 in deceit, actively or by acquiescence, he or she surrenders
12 the assumption of integrity for both himself and his
13 profession and stands exposed.

14 At that point the legal profession is faced not with
15 a choice but an obligation. It must condemn and punish
16 its members who defile the Bar through deceit. Each time
17 a lawyer's personal failure of integrity is allowed by
18 forgiveness or excuse, the profession itself shudders,
19 its disease apparent, and if untreated, becomes fatal.

20 These lawyers, Ophelia Camina and Barry Barnett, have
21 proven themselves to be completely lacking in integrity.
22 They have connived, schemed, conspired, and actively engaged
23 in conduct that any member of the Bar would find repulsive
24 if the names of the perpetrators were Smith from Garland or
25 Jones from Mesquite. The fact that they work for Susman

1 Godfrey does not give them elevated protection and it does
2 not give them the ability to stand immune.

3 They stand unrepentant and arrogant until today before
4 this Court. To Camina and Barnett, all the other lawyers
5 like them, the rules are for suckers, Boy Scouts, fools,
6 true believers. For lawyers like Barnett and Camina, the
7 ends always justify the means. Their firm motto says it
8 all: Winning is everything. Some of us know better.

9 By this Court's decision, integrity can be restored
10 to our profession and a great injustice can be recognized,
11 though never completely undone.

12 There are two audiences expectantly awaiting what
13 will come. The first audience is comprised of those who
14 believe. They believe in the system and they believe in the
15 profession. They still see this place as a place of ideals.

16 The other audience is more cynical. That audience is
17 comprised of two people: the victims of people like Barnett
18 and Camina and the perpetrators. The perpetrators are
19 watching. Lawyers like Camina and Barnett are waiting for
20 the signal, a sign that their vision of the legal profession
21 will be, if not welcomed, at least excused and tolerated,
22 enabled by an indefinite or feeble response. They are
23 looking for a wink, a nod.

24 Ed Mandel and Positive Software ask this Court to
25 render the severest possible sanctions both in this case

1 and the show cause proceeding. Nothing less will deter the
2 perpetrator class or serve to restore their past victims'
3 trust.

4 I do not ask the Court for what I believe is too much.
5 I have personally in the federal courthouse in Dallas
6 refused a client's request to hide and suppress evidence
7 and then sat back after leaving the representation and
8 watched another lawyer collect a \$40 million fee.

9 Money is not everything. What is everything is
10 protecting the integrity of ourselves, our system, and
11 protecting people like Ed Mandel from people like Barry
12 Barnett and Ophelia Camina.

13 MR. PHELAN: May I be heard?

14 THE COURT: Regarding?

15 MR. PHELAN: Just to be heard, Your Honor.

16 THE COURT: Sure.

17 MR. PHELAN: Your Honor, this -- this makes my
18 stomach hurt as I'm sure it does yours. It's -- it's --
19 it's scary. You are a judge who -- who is smarter than I
20 am and -- and you are fair and you're nice and you've got a
21 hell of a burden.

22 When I look at this case, all I can see is, there but
23 for the grace of God. We have seen a -- a blinding blizzard
24 of blown-up snippets tossed up on the board today, woven
25 together to make a breathtaking charge of a level of conduct

1 from the beginning to the end, it is still continuing, the
2 fraud is now a cover-up, the conspiracy is ongoing.

3 It's way too much, Your Honor. Dr. Pooch,
4 Ms. McCarthy, Malovos, Barnett, Camina, Gardner--they're
5 all liars, they're all cheats.

6 What we all know, though, is that there isn't a perfect
7 lawyer, including those on my left. They've made mistakes,
8 too, producing the, quote, as-produced software saying that
9 was the as-produced software and then saying, no, it wasn't.
10 That was a mistake.

11 Saying they didn't have the November 9 software when
12 their expert had it, saying just now that their expert used
13 the word "original" to mean copyrighted when the testimony
14 that we showed you and that you have has her saying, I
15 compared the original to the copyrighted, but they did
16 not produce that comparison. Was it a mistake?

17 I expected foolishly, when we to our surprise found
18 the Etchison testimony and the hard copy of the script, that
19 we would hear a bit of a mea culpa when we came in here.
20 Yes, we had it, I thought they might say. Yes, we gave it
21 to our expert. Yes, she analyzed it. Yes, we failed to
22 produce her analysis or her notes. Yes, our conduct was
23 imperfect, too. But we heard none of that, that he who is
24 without sin.

25 Let me talk technically--well, that's not right; I

1 won't do that--about a piece of evidence, the November
2 software and where Mr. Norment found it. You were told
3 that it was found on the Nitrogen server. You were shown
4 a blown-up snippet. Mr. Fogler directed your attention to
5 it.

6 The snippet is not dated November 9. It's not the same
7 size. It doesn't say LoanForce. So where did he find it?
8 It wasn't that. That was not what he found. We know that
9 much. We don't know where he found it.

10 We're told with great indignation that he perjured
11 himself when he said he only had access to it on images or
12 backups. Why wouldn't this have come from a backup that
13 was restored? Who says that could not have happened?

14 We don't know, but we don't have a perjury case here,
15 much less a subornation case. And saying that the clean
16 room was infected is just a guess.

17 What we know about the software that was targeted, the
18 accused software, is that it did not infringe. And we know
19 that there was a complete failure of proof by Positive at
20 the hearing, a failure to make the side-by-side comparison.

21 So even if someone who worked in the clean room once
22 had access, we don't know how much, to LoanForce, what the
23 end product was was noninfringing.

24 I want to talk about Barry and Ophelia and two
25 particular things that seem to have concerned you. One is

1 whether Barry's November letters to you about the purge
2 were true or false and whether he -- if they were false,
3 he should have remembered what he had said and said so to
4 you.

5 I think the Court would have to agree, everyone in
6 the courtroom would have to agree, that it was reasonable
7 for Barry Barnett to rely on his client and his experts in
8 representing to the Court what he did was just what he had
9 been told, there has been a purge.

10 He did later, months later, learn that LoanForce or
11 what was said to be LoanForce was found somewhere. Well,
12 of course. Images were made of all of the servers. You
13 could find LoanForce without the purge having been
14 imperfect. That's point one. You don't immediately snap
15 to the conclusion that the purge is imperfect just because
16 somebody finds LoanForce when servers are being restored
17 right and left.

18 Second, a lot had --

19 THE COURT: Well, forgive me for interrupting
20 because I know you're about to wrap up. But Mr. Norment,
21 when he conveyed that to Ms. Camina, specified where he
22 found it, and it wasn't from a backup. It was from a
23 server that they hadn't reviewed before.

24 MR. PHELAN: But --

25 THE COURT: So I don't know that that argument

1 works.

2 MR. PHELAN: Well, but a server that hasn't
3 been reviewed has been backed up. I -- I -- I don't -- I
4 don't think that it necessarily follows that what he found
5 it on was anything other than a tape. He had backups of --
6 of all of those servers.

7 The second thing is months had passed, Your Honor, from
8 April. And I know that -- that I certainly don't remember
9 every letter I write in a case, not every word of it. And
10 in a case of this magnitude where as much is going on as
11 was going on, I don't think the Court can fairly reach the
12 conclusion that Barry Barnett should have recalled exactly
13 what he said, should have concluded that it was false, and
14 should have reported it to the Court. I certainly don't
15 know that I could have.

16 THE COURT: But this wasn't just a stray comment.

17 MR. PHELAN: It was one of a whole -- several
18 letters, Your Honor, and a lot of back and forth and there
19 were hearings. It was not -- yes, it was not stray, and
20 he has been direct about that: I wrote it believing it
21 to be true for the stated purpose of trying to avoid the
22 injunction sought. No question about that.

23 But to say that he was on notice and aware and actively
24 aware, you know, it was in my mind, on my gosh, my letter
25 was wrong, there is just no proof of that. It takes a --

1 a -- a giant leap, and it's not the kind of thing this
2 lawyer has made his career doing. It was a mistake for
3 which he has apologized, but that's all it was, Your Honor.

4 And as for Ms. Camina's withholding evidence, I think
5 we know that she kept raising the issue of what should be
6 done with the November software, unaware that a paper copy
7 of it had been produced, and then she went off to try
8 another case. She believed that the VSS logs were all
9 that had been requested and produced then.

10 Yes, she, like these lawyers to my left, did not
11 produce all that their expert had. But those are the kinds
12 of mistakes that you could find in any case, Your Honor.
13 And while Positive's lawyers have had an opportunity that
14 none of us will ever have to get the privileged files of
15 their adversaries, sift through them, withhold most of that
16 from the other side so we don't even know what they're
17 sifting through, and then pull things out and out of context
18 argue that great crimes have been committed, and they've
19 argued it effectively -- in fact, I don't think that you
20 could find a case handled by the best lawyers that come
21 before you which have turned upside down that way would
22 not yield ammunition for similar arguments.

23 These lawyers have suffered, Your Honor. If -- if the
24 Court wishes to get their attention, you've done it. If
25 you wish for their conduct never to be repeated, you've got

1 it. It's a heavy, heavy job, but the right one, the right
2 result here, Your Honor, is to say, "Enough."

3 Thank you.

4 THE COURT: Mr. Shore, do you want to respond?

5 MR. SHORE: I think I've said everything that
6 needs to be said, Your Honor.

7 THE COURT: All right.

8 MR. SHORE: I would like to make one clarification
9 to the record because I do want to be fair.

10 We have had a preliminary look at the paper copy. And
11 although it is not identical, it is very, very close and
12 many of the tables and columns in it are from November 9.
13 There are also some from as far back as 1998, but, I mean,
14 they are -- it definitely has large components, large -- a
15 majority of the components and the one that John Norment
16 found.

17 So I want to make sure that that's -- we have only had
18 it for two days, but I wanted to make sure the Court knew
19 that.

20 THE COURT: All right. I'm going to take the
21 Positive Software piece under advisement.

22 With regard to the disciplinary proceeding, I am
23 terminating the disciplinary proceeding. I find that no
24 discipline is warranted. And in large part this is based
25 on my review of the documents.

1 As I mentioned at the earlier hearing, I found some
2 of the statements in the respondent's affidavits to be
3 facially implausible when I looked at them. And on review
4 of the documentation, I think they are plausible and find
5 that I am unable to conclude with the requisite degree of
6 certainty that there was any culpable mental state.

7 And therefore, as I've indicated before, I find
8 imposition of any sanctions is not appropriate and I am
9 concluding that proceeding.

10 The other matter will be under advisement, and I will
11 try to let you know whatever I'm going to do on that as
12 soon as I am able.

13 Anything else to take up today?

14 MR. BECK: Nothing from us, Your Honor.

15 MR. SHORE: No, Your Honor.

16 THE COURT: All right. I appreciate you-all
17 coming down. I hope you have a pleasant holiday season.
18 The Court will stand in recess.

19 MR. BECK: Thank you, Your Honor.

20 (The proceedings were concluded.)
21
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23
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25

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MOVANT'S EXHIBITS INDEX

(EXCLD)

NO.	DESCRIPTION	OFRD	ADMTD
1	Copy of New Century Certificate	9	
	of Compliance	43	44
2	Discovery Production Disk of Code	9	
	from New Century Mortgage	43	44
3	Discovery Production Disk of Code	9	
	from New Century Mortgage	43	44
4	Discovery Production Disk of Code	9	
	from New Century Mortgage	43	44

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(EXCLD)

NO.	DESCRIPTION	OFRD	ADMTD
1	Copy of Records Produced November 21, 2003	104	105

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CERTIFICATION

I certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

s/Linda J. Robbins

Date: December 22, 2008